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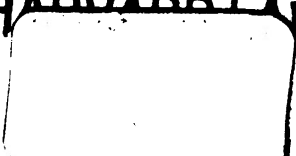
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REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS

OF ILLINOIS

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WITH A DIRECTORY OF THE JUDICIARY DEPARTMENT OF  
THE STATE, CORRECTED TO THE TWENTIETH OF  
APRIL, 1900, AND A TABLE OF CASES  
REVIEWED BY THE SUPREME COURT  
TO THE EIGHTEENTH OF  
APRIL, 1900

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VOL. LXXXVII

A. D. 1900

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REPORTED BY  
MARTIN L. NEWELL  
COUNSELOR AT LAW

CHICAGO  
CALLAGHAN & COMPANY  
1900

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# DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO APRIL 15, 1900.

## (1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

### REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

### JUSTICES.

*First District*—CARROLL C. BOGGS.....Fairfield.  
*Second District*—JESSE J. PHILLIPS.....Hillsboro.  
*Third District*—JACOB W. WILKIN.....Danville.  
*Fourth District*—JOSEPH N. CARTER.....Quincy.  
*Fifth District*—ALFRED M. CRAIG.....Galesburg.  
*Sixth District*—JAMES H. CARTWRIGHT.....Oregon.  
*Seventh District*—BENJAMIN D. MAGRUDER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

### CLERKS.

CHRISTOPHER MAMER, Northern Grand Division, 158 Throop St., Chicago.  
ALBERT D. CADWALLADER, Central Grand Division, Lincoln.  
RICHARD F. BUCKHAM, Southern Grand Division, Mt. Vernon.

The terms of office of these clerks expire 1902, after which time, under the act of 1897, but one clerk will be elected. The present clerks continue in charge of the records of their respective grand divisions as though said grand divisions had not been consolidated. All records, files, dockets and papers of their respective offices are now kept at the State House in Springfield.

**(2) APPELLATE COURTS.**

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These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

**REPORTER.**

MARTIN L. NEWELL.....Springfield.

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**FIRST DISTRICT.**

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

NATHANIEL C. SEARS, Presiding Justice, Ashland Block, Chicago.

FRANCIS ADAMS, Justice, Ashland Block, Chicago.

THOMAS G. WINDES, Justice, Ashland Block, Chicago.

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**BRANCH APPELLATE COURT.\***

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**FIRST DISTRICT.**

OLIVER H. HORTON, Presiding Justice, Ashland Block, Chicago.

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

HENRY M. SHEPARD, Justice, Ashland Block, Chicago.

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**APPELLATE COURTS—(CONTINUED.)**

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**SECOND DISTRICT.**

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

JOHN D. CRABTREE, Presiding Justice, Dixon.

DORRANCE DIBELL, Justice, Joliet.

HARRY HIGBEE, Justice, Pittsfield.

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**THIRD DISTRICT.**

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

FRANCIS M. WRIGHT, Presiding Justice, Urbana.

OLIVER A. HARKER, Justice, Carbondale.

BENJAMIN R. BURROUGHS, Justice, Edwardsville.

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\* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statute, 1897 508, Laws of 1897, 183.

## FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.  
Court sits at Mount Vernon, Jefferson county, on the fourth Tues-  
days in February and August.

CLERK—Frank W. Havill, Mount Vernon.

NICHOLAS E. WORTHINGTON, Presiding Justice, Peoria.  
JAMES A. CREIGHTON, Justice, Springfield.  
HIRAM BIGELOW, Justice, Galva.

## (3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seven-  
teen Judicial Circuits, as follows:

*First Circuit.*—The counties of Alexander, Pulaski, Massac, Pope,  
Johnson, Union, Jackson, Williamson and Saline.

## JUDGES.

JOSEPH P. ROBERTS, Cairo.  
OLIVER A. HARKER, Carbondale.  
ALONZO K. VICKERS, Vienna.

*Second Circuit.*—The counties of Hardin, Gallatin, White, Hamilton,  
Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and  
Crawford.

## JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.  
PRINCE A. PEARCE, Carmi.  
ENOCH E. NEWLIN, Robinson.

*Third Circuit.*—The counties of Randolph, Monroe, St. Clair, Madison,  
Bond, Washington and Perry.

## JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.  
MARTIN W. SCHAEFER, Belleville.  
WILLIAM HARTZELL, Chester.

*Fourth Circuit.*—The counties of Clinton, Marion, Clay, Fayette, Ef-  
fingham, Jasper, Montgomery, Shelby and Christian.

## JUDGES.

WILLIAM M. FARMER, Vandalia.  
TRUMAN E. AMES, Shelbyville.  
SAMUEL L. DWIGHT, Centralia.

*Fifth Circuit.*—The counties of Vermilion, Edgar, Clark, Cumber-  
land and Coles.

## JUDGES.

HENRY VAN SELLAR, Paris.  
FERDINAND BOOKWALTER, Danville.  
FRANK K. DUNN, Charleston.

*Sixth Circuit.*—The counties of Champaign, Douglas, Moultrie, Ma-  
con, DeWitt and Piatt.

## JUDGES.

FRANCIS M. WRIGHT, Urbana.  
EDWARD P. VAIL, Decatur.  
WILLIAM G. COCHRAN, Sullivan.

*Seventh Circuit.*—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

## JUDGES.

JAMES A. CREIGHTON, Springfield.  
ROBERT B. SHIRLEY, Carlinville.  
OWEN P. THOMPSON, Jacksonville.

*Eighth Circuit.*—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

## JUDGES.

JOHN C. BROADY, Quincy.  
HARRY HIGBEE, Pittsfield.  
THOMAS N. MEHAN, Mason City.

*Ninth Circuit.*—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

## JUDGES.

JOHN J. GLENN, Monmouth.  
GEORGE W. THOMPSON, Galesburg.  
JOHN A. GRAY, Canton.

*Tenth Circuit.*—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

## JUDGES.

LESLIE D. PUTERBAUGH, Peoria.  
THOMAS M. SHAW, Lacon.  
NICHOLAS E. WORTHINGTON, Peoria.

*Eleventh Circuit.*—The counties of McLean, Livingston, Logan, Ford and Woodford.

## JUDGES.

COLOSTIN D. MYERS, Bloomington.  
GEORGE W. PATTON, Pontiac.  
JOHN H. MOFFETT, Paxton.

*Twelfth Circuit.*—The counties of Will, Kankakee and Iroquois.

## JUDGES.

DORRANCE DIBELL, Joliet.  
ROBERT W. HILSCHER, Watseka.  
JOHN SMALL, Kankakee.

*Thirteenth Circuit.*—The counties of Bureau, LaSalle and Grundy.

## JUDGES.

CHARLES BLANCHARD, Ottawa.  
HARVEY M. TRIMBLE, Princeton.  
SAMUEL C. STOUGH, Morris.

*Fourteenth Circuit.*—The counties of Rock Island, Mercer, Whiteside and Henry.

## JUDGES.

HIRAM BIGELOW, Galva.  
WILLIAM H. GEST, Rock Island.  
FRANK D. RAMSAY, Morrison.

*Fifteenth Circuit.*—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

## JUDGES.

JOHN D. CRABTREE, Dixon.  
JAMES SHAW, Mount Carroll.  
JAMES S. BAUME, Galena.



*Sixteenth Circuit.*—The counties of Kane, Du Page, De Kalb and Kendall.

## JUDGES.

HENRY B. WILLIS, Elgin.  
CHARLES A. BISHOP, Sycamore.  
GEORGE W. BROWN, Wheaton.

*Seventeenth Circuit.*—The counties of Winnebago, Boone, McHenry and Lake.

## JUDGES.

JOHN C. GARVER, Rockford.  
CHARLES E. FULLER, Belvidere.  
CHARLES H. DONNELLY, Woodstock.

## (4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

## CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

## JUDGES.

EDWARD F. DUNNE,  
MURRAY F. TULEY,  
RICHARD S. TUTHILL,  
FRANCIS ADAMS,  
ARBA N. WATERMAN,  
ELBRIDGE HANEY,  
OLIVER H. HORTON,

JOHN GIBBONS,  
RICHARD W. CLIFFORD,  
THOMAS G. WINDES,  
EDMUND W. BURKE,  
CHARLES G. NEELY,  
FRANK BAKER,  
ABNER SMITH.

## SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

## JUDGES.

THEODORE BRENTANO,  
HENRY M. SHEPARD,  
PHILIP STEIN,  
JESSE HOLDOM,  
JONAS HUTCHINSON,  
AXEL CHEYTRAUS,

ARTHUR H. CHETLAIN,  
HENRY V. FREEMAN,  
NATHANIEL C. SEARS,  
FARLIN Q. BALL,  
JOSEPH E. GARY,  
MARCUS KAVANAGH.\*

\*Appointed to fill vacancy December 2, 1898.

### (5) CITY COURTS.

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City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

#### THE CITY COURT OF ALTON.

ALEXANDER W. HOPE, Judge.      FRANCIS BRANDEWEIDE, Clerk.

#### THE CITY COURT OF AURORA.

RUSSELL P. GOODWIN, Judge.      WM. FLETCHER FOWLER, Clerk.

#### THE CITY COURT OF CANTON.

W. H. HEMENOVER, Judge.      A. T. ATWATER, Clerk.

#### THE CITY COURT OF EAST ST. LOUIS.

SILAS COOK, Judge.      THOMAS J. HEALY, Clerk.

#### THE CITY COURT OF ELGIN.

RUSSELL P. GOODWIN, Judge.      JOHN J. KELLY, Clerk.

#### THE CITY COURT OF LITCHFIELD.

AMOS OLLER, Judge.      HUGH HALL, Clerk.

#### THE CITY COURT OF MATTOON.

JAMES F. HUGHES, Judge.      T. M. LYTTLE, Clerk.

## (6) COUNTY AND PROBATE COURTS.

In the counties of Cook, La Salle and Peoria, each having a population of over 50,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate.

JUDGES.	COUNTIES.	COUNTY SEATS.
CARL E. EPLER.....	Adams.....	Quincy.
WM. S. DEWEY.....	Alexander.....	Cairo.
JOSEPH STORY.....	Bond.....	Greenville.
WM. C. DE WOLF, JR.....	Boone.....	Belvidere.
R. E. VANDEVENTER.....	Brown.....	Mt. Sterling.
RICHARD M. SKINNER.....	Bureau.....	Princeton.
ANDREW J. EMERICK.....	Calhoun.....	Hardin.
ALVA F. WINGERT.....	Carroll.....	Mt. Carroll.
JOHN F. ROBINSON.....	Cass.....	Virginia.
CALVIN C. STALEY.....	Champaign.....	Urbana.
RUFUS M. POTTS.....	Christian.....	Taylorville.
J. C. PERDUE.....	Clark.....	Marshall.
JOHN R. BONNEY.....	Clay.....	Louisville.
JOSEPH HANKE.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
ORRIN N. CARTER.....	Cook.....	Chicago.
* Pro. Judge.		
AUSBY L. LOWE.....	Cook.....	Chicago.
ELIAS MCPHERSON.....	Crawford.....	Robinson.
WILLIAM L. POND.....	Cumberland.....	Toledo.
GEO. K. INGHAM.....	DeKalb.....	Sycamore.
WM. H. BASSETT.....	DeWitt.....	Clinton.
JOHN H. BATTEN.....	Douglas.....	Tuscola.
STEPHEN I. HEADLEY.....	DuPage.....	Wheaton.
WM. MCGREGOR.....	Edgar.....	Paris.
DAVID L. WRIGHT.....	Edwards.....	Albion.
GEO. T. TURNER.....	Effingham.....	Effingham.
ALEXANDER MCELROY.....	Fayette.....	Vandalia.
WM. H. HART.....	Ford.....	Paxton.
MEREDITH WALKER.....	Franklin.....	Benton.
GEORGE HANLON.....	Fulton.....	Lewistown.
DAVID F. KING.....	Gallatin.....	Shawneetown.
A. R. JORDON.....	Greene.....	Carrollton.
CHAS. B. THOMAS.....	Grundy.....	Morris.
CHELLIS E. HOOKER.....	Hamilton.....	McLeansboro.
WM. J. HALL.....	Hancock.....	Carthage.
RAUSELDON COOPER.....	Hardin.....	Elizabethtown.
CHESTER M. TURNER.....	Henderson.....	Oquawka.
FRANK HARRY.....	Henry.....	Cambridge.
ROBERT J. MCELVAIN.....	Iroquois.....	Watseka.
I. D. SHAMHART.....	Jackson.....	Murphysboro.
JOSEPH D. NORRIS.....	Jasper.....	Newton.
ALLEN M. SLATEN.....	Jefferson.....	Mt. Vernon.
WM. T. HODSON.....	Jersey.....	Jerseyville.
O. R. MORGAN.....	Jo Daviess.....	Galena.
M. O. SOUTHWORTH.....	Johnson.....	Vienna.
EVEN B. GOWER.....	Kane.....	Geneva.
HENRY S. HUDSON.....	Kankakee.....	Kankakee.
PHILIP S. POST.....	Kendall.....	Yorkville.
DEWITT L. JONES.....	Knox.....	Galesburg.
	Lake.....	Waukegan.

\*Office vacant. The Hon. JOHN H. BATTEN is at present acting as Probate Judge.

JUDGES.	COUNTIES.	COUNTY SEATS.
HENRY W. JOHNSON.....	LaSalle .....	Ottawa.
ALBERT T. LARDIN, Pro. J....	LaSalle .....	Ottawa.
JASPER D. MADDING.....	Lawrence .....	Lawrenceville.
RICHARD S. FARRAND.....	Lee .....	Dixon.
CHAS. M. BARICKMAN.....	Livingston .....	Pontiac.
EMIL C. MOOS*.....	Logan .....	Lincoln.
WM. L. HAMMER.....	Macon .....	Decatur.
DAVID E. KEEFE.....	Macoupin .....	Carlinville.
WM. P. EARLY.....	Madison.....	Edwardsville.
CHAS. H. HOLT.....	Marion .....	Salem.
B. W. WRIGHT.....	Marshall .....	Lacon.
JAMES A. MCCOMAS.....	Mason .....	Havana.
GEORGE SAWYER.....	Massac .....	Metropolis.
J. ROSS MICKEY.....	McDonough .....	Macomb.
ORSON H. GILLMORE.....	McHenry.....	Woodstock.
ROLAND A. RUSSELL.....	McLean .....	Bloomington.
FRANK E. BLANE.....	Menard .....	Petersburg.
WILLIAM T. CHURCH.....	Mercer.....	Aledo.
PAUL C. BREY.....	Monroe .....	Waterloo.
M. J. MCMURRY.....	Montgomery .....	Hillsboro.
CHARLES A. BARNES.....	Morgan .....	Jacksonville.
JOHN D. PURVIS.....	Moultrie .....	Sullivan.
FRANK E. REED.....	Ogle .....	Oregon.
ROBERT H. LOVETT.....	Peoria .....	Peoria.
M. M. BASSETT, Pro. Judge...	Peoria.....	Peoria.
R. W. S. WHEATLEY.....	Perry .....	Pinckneyville.
F. M. SHONKWILER.....	Piatt.....	Monticello.
B. F. BRADBURN.....	Pike .....	Pittsfield.
WM. A. WHITESIDE.....	Pope .....	Golconda.
JOHN D. BRISTOW.....	Pulaski.....	Mound City.
JOHN M. McNABB.....	Putnam .....	Hennepin.
WARREN N. WILSON.....	Randolph.....	Chester.
PARKE HUTCHINSON.....	Richland .....	Olney.
LUCIAN ADAMS.....	Rock Island.....	Rock Island.
JOHN L. THOMPSON.....	Saline.....	Harrisburg.
GEORGE W. MURRAY.....	Sangamon .....	Springfield.
H. V. TEEL.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
THOMAS RIGHTER.....	Shelby .....	Shelbyville.
WM. W. WRIGHT.....	Stark .....	Toulon.
FRANK PERRIN.....	St. Clair .....	Belleville.
WM. N. CRONKRITE.....	Stephenson.....	Freeport.
GEO. C. RIDER.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union .....	Jonesboro.
M. W. THOMPSON.....	Vermilion .....	Danville.
LYMAN LEEDS.....	Wabash.....	Mt. Carmel.
T. G. PEACOCK.....	Warren .....	Monmouth.
GEO. VERNOR.....	Washington.....	Nashville.
L. E. SUNDERLAND.....	Wayne .....	Fairfield.
JOHN N. WILSON.....	White .....	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
ALBERT O. MARSHALL.....	Will.....	Joliet.
WILEY F. SLATER.....	Williamson .....	Marion.
RUFUS C. BAILEY.....	Winnebago.....	Rockford.
THOMAS KENNEDY.....	Woodford.....	Eureka.

\* Died April 8, 1900.

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## IN THE

# APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1899,

Chicago General Ry. Co. v. Chicago City Ry. Co.

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1. **PLEADING—Rule of Construction.**—A pleading is to be construed most strongly against the pleader.

2. **EASEMENTS—Authorized by the State Can Not be Public Nuisances.**—Where a public easement has been authorized by the State, no action can be maintained on the assumption that it is a public nuisance, for that can not be a public nuisance which the State assents to and authorizes.

3. **NUISANCES—Obstruction of Highways.**—Any unreasonable obstruction of a highway is a public nuisance; but where a street car company occupies streets with its tracks and cars rightfully and lawfully, the mere change in the motive power of the cars and the operation of three cars at a time instead of one, and at a higher rate of speed than they can be operated by animal power, will not be such an unreasonable obstruction of the street as to constitute a nuisance.

4. **CORPORATIONS—Responsibility for Wrongs Committed or Authorized.**—Corporations are responsible for the wrongs committed or authorized by them under substantially the same rules which govern the responsibility of natural persons.

5. **SAME—Liability for Acts Ultra Vires.**—If an act of a corporation is *ultra vires* and creates a public nuisance, it is liable for such injuries as result from the *ultra vires* act.

6. **SAME—When Ultra Vires Affords no Defense.**—Corporations can not shield themselves for a tort committed in the prosecution of their business by a claim that the acts were *ultra vires*. The doctrine of *ultra vires* has no application in such cases and affords no defense.

7. **SAME—Ultra Vires of no Advantage to the Plaintiff.**—A plaintiff can be allowed no advantage in a suit against a corporation for an injury

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caused by its own *ultra vires* act, simply because the act is *ultra vires*, when the act in question is not prohibited by positive law, or is a nuisance or a crime.

8. SAME—*By Whom the Doctrine of Ultra Vires Can Be Invoked.*—The charter of an incorporated company is not a contract between the corporate body, on the one hand, and the individual whose rights and interests may be affected by the exercise of its powers on the other. It is a compact between the corporation and the government, from which it derives its powers, and individuals can not insist on breaches of the contract of incorporation as a ground for resisting the exercise of its powers. That can be done only by the government, and in proceedings duly instituted against the corporation.

**Appeal** from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 5, 1900.

GLENN E. PLUMB, attorney for appellant.

The appellee's charter forbids it to operate its cars in this State by any other than animal power. *People v. Pullman Palace Car Co.*, 175 Ill. at 136; *Commonwealth v. Erie & N. E. Ry. Co.*, 27 Pa. St. 339; *Indianapolis Cable St. Ry. v. Citizens St. Ry. Co.*, 8 L. R. A. 548; *People v. Newton*, 3 L. R. A. 174, 48 Hun, 477; *Denver & Swansea Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673; *Farrell v. Winchester Ave. Ry. Co.*, 61 Conn. 127; 3 Am. El. Cas. 85; *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207.

The operation of cable trains in a public highway by a corporation not authorized by its charter to so occupy the highway constitutes a nuisance. *Starr & Curtis Rev. St.*, Ch. 38, par. 369, Sec 5; *Shearman & Redfield on Neg.* (5th Ed.), Vol. 1, Sec. 365; *Gen. El. Ry. Co. v. Chicago & W. I. Ry. Co.*, 84 Ill. App. 640; *Denver & S. Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673; *North Chicago City Ry. v. Lake View*, 105 Ill. 183; *Congreve v. Smith*, 18 N. Y. 79; *Renwick v. Morris*, 3 Hill, 621; affirmed 7 Hill, 575; *Dygart v. Schenck*, 23 Wend. 446; *Weick v. Lander*, 75 Ill. 96; *Commonwealth v. Erie & N. E. Ry. Co.*, 27 Pa. St. 339; *Louisville, etc., Ry. Co. v. Smith*, 91 Ind. 119.

One who sustains a special injury because of the existence or maintenance of such a nuisance in a street can recover his damages from the person maintaining or creating

the nuisance. Shearman & Redfield on Neg., Sec. 365, *supra*; Farmers' Co-operative Mfg. Co. v. Albemarle & Raleigh Ry. Co., 29 L. R. A. 700; Lincoln Rapid Transit Co. v. Nichols, 37 Neb. 332.

E. R. BLISS, attorney for appellee.

The authority of appellee to operate its cars by means of cable power can not be assailed or questioned in a collateral proceeding. The question can only be raised in a direct proceeding, instituted by the proper authorities against the corporation for that purpose. C. & E. I. R. R. Co. v. Wright, 153 Ill. 307; Rice v. R. I. & Alton R. R. Co., 21 Ill. 94; Patterson v. C., D. & V. R. R. Co., 75 Ill. 588; Atty. Gen. v. C. & E. R. R. Co., 112 Ill. 520; Phelps v. Lake St. Elevated R. R. Co., 60 Ill. App. 471; Cook Co. v. Great West. R. R. Co., 119 Ill. 218; Kansas City H. R. R. Co. v. Hovelman, 14 Am. & Eng. R. R. Cases, 20, page 17; Logan v. Vernon R. R. Co., 14 Id. 43.

The mere unauthorized change of motive power from animal power to cable would not constitute a public nuisance. The law concerning encroachments upon highways for other purposes than furnishing additional facilities for travel is not applicable. Phelps v. Lake St. Elevated R. R. Co., 60 Ill. App. 471.

The alleged unauthorized use of cable power does not appear to have been the proximate cause of the injury complained of. There must be the direct relation of cause and effect. T., W. & W. R. Co. v. Jones, 76 Ill. 311; P., P. & J. R. R. Co. v. Siltman, 67 Id. 72; C., B. & Q. R. R. Co. v. Dvorak, 7 Ill. App. 555; C., B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510.

**Statement by the Court.**—This is an action on the case by appellant against appellee to recover damages by reason of a collision occurring at the crossing of appellant's and appellee's railway tracks at State and Twenty-second streets, Chicago, resulting in injury to appellant's car.

The declaration consists of five counts, in the first of

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which it is alleged that on October 15, 1897, appellant was operating its electric car upon its tracks on Twenty-second street, at a crossing of Twenty-second street at State street, by virtue of an ordinance of the city, on which latter street appellee was possessed of a certain railway, with certain cars operated thereon; that appellee "was then and there operating its said railway cars in and along State street under and by virtue of an ordinance of the city of Chicago," that said ordinance provided that "the cars to be used upon said tracks shall be operated with animal power only;" that the ordinance was by act of the general assembly incorporated into and made a part of appellee's charter, which limits appellee to the operation of its cars by animal power only; that appellee, in violation of its charter, was then and there operating its cars upon and along State street by means of an underground cable propelled by certain steam engines of great power, which drove said cable at a high rate of speed, to wit, twenty miles per hour; and that while appellant, with all due care and diligence, was operating its car aforesaid, appellee, by its servants, because of the unlawful manner by which it was driving and operating said cars on its said railway, and because appellee was unlawfully operating its said cars by steam-driven cables, instead of animal power only, the appellee improperly, carelessly, negligently and unlawfully drove and managed its cars so that its said cars then and there ran and struck with great force, etc., against appellant's car, thus causing the injury complained of.

The remaining counts of the declaration are in substance and effect the same as the first count, all alleging that appellee operated its railway tracks by virtue of an ordinance of the city of Chicago, which, it was alleged, allowed appellee to use animal power only, but that in violation of its charter, it operated its cars by an underground cable propelled by steam power, and that the injury complained of was caused by reason of the alleged unlawful manner in which the cars were operated by a steam-driven cable instead of by animal power. The second count alleges that a train of three cars

was operated by the cable, and that this was greatly in excess of the weight of a car operated by animal power only, and that the momentum of the same was greatly in excess of the momentum of a car operated by animal power only. The third count sets up, in addition to the other allegations of the first count, a contract between appellant and appellee binding appellee to pay for any injury or damage which might be caused by the negligence of appellee, or its employes, by the operation of its cars at said crossing, and a further provision that the contract should not be held to release either party from the performance of every duty and obligation imposed upon it by the laws of the State and the ordinances of the city. The fourth count sets out *in haec verba* the ordinance under which it was alleged the appellee was given authority to construct its railway, and which it was alleged was made a part of its charter. This count also contains the same allegations, in substance, as to the excess of weight of appellee's train, as operated by cable power, and excess of momentum of such train over that of a car operated by animal power which is contained in the second count. Negligence on the part of appellee is not made the gist of the action in any of the counts.

Appellee demurred generally and specially to each and all of the counts, which was sustained by the court, and appellant electing to stand by its declaration, a judgment was entered for the defendant, the appellee here, from which this appeal is taken.

MR. JUSTICE WINDES delivered the opinion of the court.

We have not set out the special causes of demurrer assigned, for the reason that after consideration of the same we are of opinion they are not well taken, and to refer to them in detail would unnecessarily extend this opinion.

The principal question presented for consideration is upon the general demurrer. Appellant's counsel, in his brief, says that the theory of the declaration is that appellee, "under the provisions of its charter, is authorized to operate its cars in State street by 'animal power only,' and that

in violation of this restriction in its charter it was at the time of the accident operating its said railway by means of steam-driven cables, and that because of the operation of its railway in this manner the collision occurred, whereby the appellant suffered the damages alleged by it in its said declaration." In his reply brief he also says, "we are seeking to recover damages for the destruction of our car by means of the unlawful use of cable power," and that appellant can not complain that appellee operates its cars "unless they ran into us or in some way caused us special injury;" and that appellant is not seeking to prevent appellee from operating its cars nor to have a forfeiture of its charter declared, but that "we are seeking to recover damages which we have suffered because of certain acts of appellee which we allege are unlawful."

In other words, the question presented may be stated thus: Can appellant, in this action, recover damages without any allegation that appellee was negligent, upon the simple allegation that in the operation of its cars, under and by virtue of its charter from the State and ordinance of the city, it has exceeded its charter powers by using cable instead of animal power, by reason of which the injury complained of was caused, while appellant was in the exercise of due care?

The principal contention of appellant's counsel seems to be that the matters alleged in the declaration show that appellee is guilty of a nuisance in the public street, and that because of such nuisance it is liable for any damage which may result therefrom, without reference to whether it was negligent or not.

It is elementary that a pleading is to be construed most strongly against the pleader. The declaration shows, in effect, by each of the counts, that appellee's tracks were laid and its cars are operated under and by virtue of its charter from the State and an ordinance of the city. The tracks are therefore laid in the street and the cars are operated thereon rightfully and lawfully.

In *C. & E. I. R. R. Co. v. Loeb*, 118 Ill. 211, the court say: "A railroad track laid upon a street of a city by authority

of law, properly constructed, and operated in a skillful and careful manner, is not, in law, a nuisance." There is no allegation that appellee's tracks were not properly constructed nor that its cars were not operated in a skillful and careful manner.

In Cooley on Torts, p. 732, the author says that where a public easement has been authorized by the State, "no action can be maintained on the assumption that what is thus allowed is a public nuisance, for that can not be a public nuisance that the State assents to and authorizes. It would be a contradiction in terms to say that the State assents to a certain act, and yet that the act constitutes an offense against the State." This statement of the law is supported, among other authorities by the following: Commonwealth v. Reed, 34 Pa. St. 275; Danville, etc., R. R. Co. v. Commonwealth, 73 Pa. St. 29, in which latter case it is said, "a work which is authorized by law can not be a nuisance;" and People v. Gas Co., 64 Barb. 55-70; Everett v. City, 53 Mich. 450.

It is not alleged in the declaration that the operation of appellee's cars in the street by cable power make a nuisance, nor are there any facts alleged from which it may be said, if proven, they show, as matter of law, that appellee was guilty of a nuisance.

In Wood on Nuisances, Sec. 248, the author says, "Any unreasonable obstruction of a highway is a public nuisance," but that what the extent of the obstruction must be in order to create a nuisance is not definitely settled by the cases. From a somewhat extensive examination of cases we think the statement of the author is correct.

We are inclined to the opinion that, the declaration showing, as it does, that appellee occupied the street with its tracks and cars rightfully and lawfully, the mere change in the motive power of the cars, and the operation of three cars at a time instead of one, and at a higher rate of speed than they could be operated by animal power, would not be such an unreasonable obstruction of the street as to constitute a nuisance.

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The law seems well settled that "corporations are responsible for the wrongs committed or authorized by them under substantially the same rules which govern the responsibility of natural persons." Cooley on Torts (2d Ed.), 136; Darsey Mch. Co. v. McCaffrey, 139 Ind. 545-51; R. R. & Bk'g Co. v. Smith, 76 Ala. 572-82; State v. R. R. Co., 23 N. J. L. 368; Nims v. Mt. Hermon Boys' School, 160 Mass. 177; Denver, etc., Ry. v. Harris, 122 U. S. 608.

And in the case of a tort it is held in the McCaffrey and Smith cases, *supra*, and Hussey v. R. R. Co., 98 N. C. 41, the doctrine of *ultra vires* has no application. The question as to whether the corporation is liable or not, must be determined independent of the fact as to whether the act complained of is *ultra vires* or not. There are cases to be found in the books, some of which are cited by appellant's counsel, which hold a different rule as to *ultra vires* acts, notably, Jones v. Ry. Co., 3 L. R. (Q. B.), 733-6; Mo. Packet Co. v. R. R. Co., 79 Mo. 479-90; Thomson v. Penn. Co., 51 N. J. L. Rep. 42; but we think they are not sustained either by reason or the weight of authority. It seems unreasonable and unjust to hold that a corporation should be mulcted in damages for the doing of an act simply because it is *ultra vires*, when, if the same act were done by a natural person there would be no liability. It certainly can not be maintained that a teamster, who has a perfect right to drive his wagon on the public streets, would be liable for damages, without regard to his negligence, if he hitched together three wagons, one after the other, and propelled them along the streets by some unseen power at a high rate of speed, and by so doing caused an injury, unless he so obstructed the street as to create a nuisance. If an individual would not be liable under these circumstances, there seems to us no good reason, either in law or morals, why appellee should be liable under the allegations of appellant's declaration.

It is no doubt the law that if the act of a corporation is *ultra vires*, and such that it creates a public nuisance, then it is liable for such injuries as may result from the *ultra*



*vires* act. Wood on Nuisances, Sec. 300; Salt Lake City v. Hollister, 118 U. S. 256-61; R. R. Co. v. Alexander, 66 Miss. 496; Hussey v. R. R. Co., 98 N. C. 34-41; Nims v. Mt. H. B. School, 160 Mass. 177-80.

No doubt, upon the doctrine just stated, the courts have proceeded in the cases in which it is held that corporations are liable for *ultra vires* acts simply because they are *ultra vires*, but in none of the cases which we have seen does it appear that the right of the party injured to raise the question of *ultra vires* was made.

If, however, we are wrong in holding as we do, that plaintiff has not alleged such facts as show that appellee is guilty of a nuisance in the operation of its cars by cable instead of animal power, and that the appellant's declaration, when fairly construed, shows that appellee has exceeded its charter powers in propelling its cars by cable, and that such act constitutes a nuisance by obstructing the street, for which it is liable for any injuries caused thereby, without reference to the question of negligence, still the question as to whether appellee has exceeded its charter powers can not, in our opinion, avail appellant in this action but can only be taken advantage of by the State or the city, in a direct proceeding against appellee.

In *Pres. and Trustees v. Thompson*, 20 Ill. 197, it was held that the power of a corporation, acting as such, can not be questioned collaterally on the ground that it has not complied with its charter. The case was debt for a penalty for selling liquors by the president and trustees of a town. In *Rice v. R. R.*, 21 Ill. 93, it was said that if a corporation "has usurped franchises not granted by the statute, that should more properly be inquired into by a direct proceeding to seize the franchises to the people and dissolve the corporation," and held that the corporation should not be compelled in every suit it might bring to show that its organization was formal and proper. The doctrine of these cases is repeated and reaffirmed in *Tarbell v. Page*, 24 Ill. 46, *Renwick v. Hall*, 84 Ill. 162, and *People v. Trustees*, 111 Ill. 172, which last case was mandamus to compel

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school trustees to appoint appraisers to value school property, and it was held that the organization of a corporation, acting as such, and exercising the franchises of a school district, could not be attacked in such a proceeding.

In *Alexander v. Tolleston Club*, 110 Ill. 65-72, where the question was as to the power of a corporation to hold real estate under its charter, it was held that as the corporation might, for some purposes, hold title to real estate, its right in that regard could only be questioned by a direct proceeding in behalf of the State; and that it made no difference whether the matter of *ultra vires* was interposed for or against the corporation. The doctrine is again asserted in *Barnes v. Suddard*, 117 Ill. 243, where the question was as to whether the corporation had exceeded its powers in taking title to real estate, and it was said that this was a question that did not concern a third party, but only the corporation and the State. The same question was again before the Supreme Court in *Hamsher v. Hamsher*, 132 Ill. 286, and it was held that the question could not be raised by any party except the State. Numerous cases in other jurisdictions, where the question arose on matters *ex contractu*, are to the same effect. *Ragan v. McElroy*, 98 Mo. 349; *Bank v. Merchants Bk.*, 10 Mo. 84; *Grant v. Coal Co.*, 80 Pa. St. 209; *Pixley v. Navgn. Co.*, 75 Va. 320-4; and *Lumber Co. v. Ward*, 30 W. Va. 43-9, are only a few of such cases.

There are also numerous cases that corporations can not shield themselves for a tort committed in the prosecution of their business by a claim that the acts were *ultra vires*. The doctrine of *ultra vires* has no application in such cases and affords no defense. 3 *Wood on Railroads*, 1612.

This is right and as it should be; the plaintiff too should be allowed no advantage in a suit against a corporation; for an injury caused by its *ultra vires* act, simply because the act is *ultra vires*, when the act is not prohibited by positive law, or is a nuisance or a crime.

We see no reason why the holdings in the cases above cited, where the question arose collaterally as to the excess

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or usurpation of corporate powers, in the cases of taking title to real estate and in matters *ex contractu*, should not be applied in actions for tort based solely upon an excess of corporate power.

There is, however, authority more nearly in point than any of the cases above noted. In the case of *Williams v. Citizens Ry. Co.*, 130 Ind. 71, certain house movers were restrained from moving a house across and along a street electric railroad, because it would necessitate cutting the railway company's wire and stop its cars. It was claimed that the railway company had no lawful right to use electricity as a motive power for propelling its cars, and therefore the injunction should not have issued, and it was held that, although this might be true, the house movers could not raise the question; that inasmuch as the railway company assumed, under color of law and claim of right, to exercise its corporate functions, only the State could raise the question as to the validity of such assumption and exercise of such functions and rights, and an individual could not successfully assail them in a collateral proceeding. The court say :

"It would violate the plainest principles of law to permit an individual citizen to confiscate or destroy the property of a corporation which has assumed to exercise rights under the laws of the State and to which the officers of a governmental subdivision have given recognition by granting to it the right to use the streets of a city."

In *Hine v. Ry. Co.*, 73 N. W. Rep. 116-18 (Mich.), which was an action against the company to recover for injuries caused by it to a child on the street, it was claimed that the company was liable because it had no right to use electricity. The court say :

"We do not think this question can be raised in this proceeding. The fact was made to appear that the company did operate its cars by electricity, and for the purpose of this case the trial must proceed as though it had the right to do so. If the street railway company is operating its road contrary to the terms of its franchise, the question could undoubtedly be raised by the city in a proper proceeding, but we do not think the question is involved in this issue."

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In the Pixley case, *supra*, the court gives the reasons why an excess of corporate power can not be taken advantage of in a collateral suit, which reasons seem equally pertinent in an action *ex delicto*. The court say :

"It (the charter) is not a contract between the corporate body on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers on the other. It is a compact between the corporation and the government, from which they derive their powers. Individuals, therefore, can not take it upon themselves, in the assertion of private rights, to insist on breaches of the contract of the corporation as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government, with which the contract was made, and in proceedings duly instituted against the corporation."

If appellant can in this case raise the question as to the right of appellee to operate its cars by cable power, then every other corporation or person who may claim to be injured or be aggrieved by the method of operation of appellee's cars may make the same claim, and thus compel the appellee over and over again to litigate this question as to whether it has exceeded its charter powers, which would be purely collateral and incidental to the right of recovery in every such suit. And even if it had a perfect right, under its charter, to use cable power, it would still have, to make its defense until the State or city authorities could be prevailed upon to bring a direct proceeding and thus settle the question. We are of opinion that it would be unreasonable to allow such collateral attack upon appellee's franchise, and therefore think that the demurrer to appellant's declaration was properly sustained. The judgment is affirmed.

MR. JUSTICE ADAMS, concurring.

Appellant seeks to recover by usurping the province of the State, in questioning the right of appellee, an acting corporation, to operate its cars by steam-driven cable. I am of opinion that this can not be done in a private action.

MR. PRESIDING JUSTICE SEARS.

I do not concur in the assertion that the decisions in

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Jones v. Ry. Co., 3 L. R. (Q. B.) 733, and Thompson v. Penn. Co., 22 Vroom, 42, are lacking in reason or authority to sustain them. I am of opinion that the only ground upon which the sustaining of the demurrer in this case can be justified, is because it appears from allegations in each count of the declaration that the appellee company, in the doing of the acts complained of, "was operating its trains under and by virtue of an ordinance of the city of Chicago."

The question of whether the act thus said to have been done under color of right, was in fact in abuse of its franchise, can not be raised collaterally and in this proceeding.

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**Eva Aurand v. Ambrose J. Aurand and Henry R. Huntington.**

87	29
98	1525

1. *BONDS—Successive Instruments, When Cumulative in Effect.*—The court holds in this case that the securities given by the two successive bonds are cumulative in effect and that the giving of the second does not discharge the former.

Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed February 5, 1900.

**Statement.**—This suit was begun by plaintiff in error in an action of debt and upon an appeal bond. The appeal, to perfect which the bond sued upon was given, was to this court from a decree of the Circuit Court. The declaration counted upon this bond only. Pleas were filed by defendants in error, who were defendants in the court below. Upon issue joined the cause proceeded to trial. At the commencement of the case counsel for plaintiff in error, the plaintiff there, announced, by way of an opening statement to court and jury, that the appeal upon which the bond sued upon had been given was afterward determined in this court by an affirmance of the decree of the trial court, and that thereafter an appeal from the judgment of

this court had been taken to the Supreme Court, and that upon such latter appeal another appeal bond had been given to secure the payment of the decree and costs. It was also stated that the second appeal bond was in the same penalty and was executed by the same parties, principal and surety. It was also announced that the second bond "had been paid, with the exception of a small amount." At the conclusion of this statement by counsel for the plaintiff, the court of its own motion directed the jury to return a verdict for the defendants. The instruction was in terms as follows:

"The jury are instructed that upon the statement of the plaintiff's case, as made by counsel for plaintiff, there can be no recovery in this case, and your verdict must be for the defendant."

From judgment upon a verdict returned in compliance with this direction, the appeal here is prosecuted.

F. S. MURPHY and JOHN W. BANTZ, attorneys for plaintiff in error.

MILFORD J. THOMPSON and HARRY JESSUP, attorneys for defendants in error.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The only question presented for our determination is as to whether the statement of counsel for appellant at the opening of the trial below disclosed such a state of facts as precluded a right of recovery. The payment of a part of the amount due upon the second bond was not sufficient to preclude a right of action for whatever remained unpaid. It was, therefore, solely upon the effect of the giving of the second appeal bond that the action of the trial court must have been based. But the giving of the second appeal bond did not operate to supersede and discharge the obligation created by the first bond. The securities thereby created were cumulative. Notwithstanding the giving of the new bond upon the second appeal, the obligation of the bond

sued upon, given upon the first appeal, could be enforced. There had been no enforcement of the obligation of the second bond, so far as is disclosed, but merely a payment on account of such obligation, and in part only. Therefore neither the first nor the second of the appeal bonds was wholly discharged, and each remained to that extent enforceable against defendants in error.

It is quite well settled that the securities thus given by the two successive bonds are cumulative in effect and that the giving of the second does not discharge the former. *Becker v. The People*, 164 Ill. 267.

It was, therefore, error to exclude evidence and to instruct the jury peremptorily to return a verdict for the defendants.

It is impossible to determine from the abstract of the record whether the cross-errors argued are of importance. There appears nothing by which to determine the relative dates of the orders for cost bond, and dismissing and reinstating the suit. If the record itself be searched the defendants in error gain nothing, for it is disclosed that although cross-errors are argued, none are assigned upon the record.

The motion of defendants in error to dismiss the writ of error is denied.

The judgment is reversed and the cause is remanded.

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**Metropolitan West Side El. R. R. Co. v. Elizabeth McDonough.**

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95	495

87	31
1112	241

1. CORPORATIONS—*Liability for the Acts of Contractors, etc.*—Where the construction of an elevated railroad is done by a contractor, or his sub-contractors, under the direction and supervision of the engineer of the company, and a person while passing along the street underneath the structure, in the exercise of ordinary care for his safety, is injured by a bolt falling from the structure overhead, causing an injury, proof of such injury makes a *prima facie* case of negligence, which it is incumbent upon the company to explain.

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Error to the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 5, 1900.

**Statement by the Court.**—Defendant in error brought an action in case against plaintiff in error to recover damages for an injury caused by the falling of an iron bolt from its elevated railroad where it crosses over Morgan street, in the city of Chicago, at an elevation of about twenty-three feet above the street, and recovered a verdict and judgment of \$2,500, from which this writ of error is prosecuted. The declaration as originally filed alleges in substance that the railroad company negligently permitted certain large bolts to remain loose on top of its structure, permitted certain children to go up on top of said structure and play with said bolts, and that the children carelessly permitted one of the bolts to drop and strike defendant in error, thus causing the injury complained of. Afterward, by amendment, the Carnegie Steel Company, Limited, John G. Wagner and the Milwaukee Bridge and Iron Works were made parties defendant, and all the papers were amended charging them as defendants accordingly, but it does not appear that process was ever served on the latter two defendants, or that they ever appeared in the cause.

Three additional counts were afterward filed, in the first of which it is alleged, in substance, that the Railroad Company was the owner of certain franchises for an elevated railroad, was constructing the same along its right of way across Morgan street, and made a contract with the Steel Company to construct the railroad for the Railroad Company; that the Steel Company afterward entered into a contract with Wagner and the Iron Works by which the last named defendant agreed to do certain iron work necessary in the construction of the railroad; that after a part of the structure had been erected across Morgan street, and while all the defendants were in possession and control of that part of the structure, they negligently, etc., permitted a certain large bolt to remain loose on top of said structure over one of the public sidewalks on Morgan street, and negligently,



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etc., permitted certain young children to be and remain on top of the structure over said street, and while plaintiff, in the exercise of due care, was walking along said sidewalk, said children negligently permitted to be and remain on said structure, negligently, etc., caused and permitted said bolt to fall from said structure, thus causing the injury, etc.

The second additional count, after setting up the contracts as above mentioned, and that the Railroad Company was constructing its road, makes the same charges as to the bolt, the children and the falling of it, causing the injury, but does not charge that the Railroad Company had anything to do with the falling of the bolt, except that it was constructing its railroad through the other defendants.

The third additional count, after setting up that the Railroad Company was the owner of the right of way for an elevated railroad, as described in the other counts, and the contract between it and the other defendants, as described in the first additional count, alleges that all the defendants were in possession and control of the said elevated structure and that while plaintiff was, with due care, walking along the sidewalk on Morgan street, under said structure, they negligently, etc., permitted a certain large bolt to fall from the structure, which struck plaintiff on the head, causing the injury, etc.

A trial was had before the court and jury upon pleas of the general issue by the Railroad Company and the Steel Company, to the original declaration and additional counts, and at the close of all the evidence the Steel Company was, upon its motion and by direction of the court, found not guilty by the jury. A similar motion by the Railroad Company was overruled by the court, and thereafter, the case having been submitted to the jury upon instructions asked upon behalf of the Railroad Company, the jury rendered a verdict finding "the defendants guilty," and assessing the plaintiff's damages at \$2,500. On this verdict judgment was rendered against the Railroad Company alone.

Numerous instructions were given to the jury, at the re-

quest of the Railroad Company. Some requested were modified and given as modified, and others requested were refused. No instructions were given on behalf of the plaintiff.

The evidence shows that the Railroad Company was authorized by ordinance of the city of Chicago to construct its railroad in question through the city and across Morgan street, and it was admitted on the trial the Railroad Company owned the land and right of way upon which the railroad was built, so far as necessary to be considered in this case, except that part included in Morgan street.

It also appears that the Railroad Company in 1892 made a contract with one Walcott for the construction and equipment of its railroad, subject to examination and approval of the engineer of the Railroad Company. This contract was, by the assent of the Railroad Company, assigned to the West Side Construction Company, a corporation, and the Construction Company thereafter made a contract with the said Steel Company to furnish the material and erect the superstructure of the said railroad, the work to be done under the direction and inspection of the chief engineer of the Railroad Company and in strict conformity to plans and instructions as should from time to time be given by said engineer, and that the work should be pushed forward by as many plants and gangs of workmen and at as many points along the lines as might be directed by said engineer, and the Steel Company thereby undertook and agreed to indemnify the Railroad Company against all loss or damages for or by reason of, among other things, claims of persons by reason of accidents, and from damages sustained by depositing materials to the injury of any person or persons.

It also appears that the F. J. McCain Company laid the rails upon said structure across Morgan street under a sub-contract with said Construction Company; that the Steel Company erected the steel work upon which the rails were laid and the railroad operated; that the Railroad Company had nothing to do with the construction of its railroad, except as provided by the terms of the contract between the Construction Company and the Steel Company, as above

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referred to, and did not operate its cars until long after the injury to plaintiff.

The plaintiff, besides testifying to the nature and extent of her injuries, testified as follows :

“On June 6, 1894, I was injured on Morgan street; on the east side of Morgan street. I was walking north to take the Van Buren street car. I was on the south end of the elevated structure, just going under it, going north on the east side of the street. The elevated railway was over the street at that point, about twenty-three feet above the street. As I was walking under I was struck with a bolt. That is the bolt. (Witness shown bolt.) It weighs about two pounds and a couple of ounces, maybe two pounds and a half. I have kept it ever since. The bolt came from the railroad.” \* \* \* “I didn’t before or after the accident notice whether any person or persons were on top of the elevated railroad at that point. I didn’t notice anybody on there. I didn’t notice when I was under there.”

Cross-examination :

“This bolt fell from the elevated railroad. There are two tracks there. They were not operating the road all that time. It was the track on the south end where the bolt fell and hit me. I was on the east side of Morgan street. The bolt came from the elevated railway. I didn’t see this bolt drop, and didn’t know it was there until I was struck. I was unconscious.” She also said, “There was a gentleman came to my assistance, and he insisted on my taking that bolt home. He said it was the bolt that struck me.”

No objection was made to this evidence.

The engineer of the Construction Company, among other things, testified that at Morgan street the railroad was a four track structure; that the bolt in question “is what is known as a guard rail bolt. It is used as part of the track construction.” \* \* \* “In June, 1894, all the structure was up. The tracks were laid at that particular point. It was all cleared up. I meant that it was entirely finished, ready for operation at that particular point. Everything was ready. At that time men were employed at various points erecting the iron structure.” He also says that the men were working east of Morgan street, and had reached

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a point four or five blocks beyond that point; that the Steel Company had possession or was one of the parties in possession of the structure at Morgan street; that their work had not been accepted by the Construction Company; also that the Construction Company was an entirely separate company from the Railroad Company, and that at the time in question the rails extended eastward from Morgan street, somewhere east of Halsted street, about three blocks. He also says that at the time in question, if anybody had possession of the railroad structure at Morgan street, it was the Construction Company; that the McCain Company did the track laying, which required the use of the bolt in question, and at the place in question there was no work remaining to be done at this point which required the use of a bolt like the one in question; also that the Railroad Company had nothing to do as to the making of sub-contracts or the hiring of servants or employes of the Construction Company or of its sub-contractors.

Ethel Adams testified that she saw the bolt in question fall from the elevated railroad on Morgan street, and in response to the question as to whether she saw any person or persons upon the elevated railroad, answered, "I did. There were two boys up there. They were out about in the center of the street; above the center of Morgan street. They were large boys. I did not notice what they were doing."

There was no other evidence as to how defendant in error was injured, nor as to the circumstances attending it, nor as to the connection of plaintiff in error or its contractors or sub-contractors therewith. The plaintiff in error offered no evidence.

IRA C. WOOD and ADDISON L. GARDNER, attorneys for plaintiff in error; W. W. GURLEY, of counsel.

JAMES C. McSHANE, attorney for defendant in error.

MR. JUSTICE WINDES delivered the opinion of the court. It is claimed that there was error, first, in entering judg-

ment upon the verdict finding "the defendants guilty;" second, in refusing certain instructions and in modifying others; third, that the verdict is contrary to the evidence; and fourth, that defendant in error was not entitled to recover under the law and the evidence.

Under the last contention it is claimed that the Railroad Company had nothing to do with the construction of the road, except to determine how much had been done from time to time, until long after the accident, and that the servants of the sub-contractor were not the servants of the Railroad Company.

The facts in this case, as will be seen from the foregoing statement, in so far as this contention is concerned, are analogous to the facts in case No. 8540, between this Railroad Company as plaintiff in error, and one Dick, defendant in error (p. 40, this volume). We refer to the opinion in that case by Mr. Justice Adams (speaking for the court), for a full discussion, review of the authorities, and a decision of this question.

There was no error of which the Railroad Company can complain in the entry of judgment against it on the verdict of the jury finding "the defendants guilty." As we have seen, the Steel Company, under the direction of the court, was found not guilty prior to the final verdict, and the other two defendants in the case do not appear to have been served with process, and were not before the court by appearance or otherwise. The error, if one, did no injury to the Railroad Company, and was therefore without prejudice.

The court refused the fourth instruction as asked by plaintiff in error, as follows :

"The jury are instructed that the burden is upon the plaintiff in this case to prove what caused the bolt in question to fall. Therefore, if the plaintiff has failed to prove by the evidence in this case what caused the said bolt to fall, and that the said bolt was caused to fall by the negligence of the defendant, The Metropolitan West Side Elevated Railroad Company, then the jury should find the defendant, The Metropolitan West Side Elevated Railroad Company, not guilty."

But the court modified it by striking out the words, "what caused the bolt to fall, and that the said bolt was caused to fall through or by reason of," and inserted in lieu thereof, the words, "that the said bolt fell through or by reason of." We see no error in the modification as made by the court. It was not necessary for the jury to find what caused the bolt to fall in order to charge the Railroad Company with negligence. It was enough, as will be shown later, as to this point, for the jury to find that the bolt fell, and it was for the Railroad Company, in order to shield itself from the charge of negligence, to explain why it fell. This was not attempted.

The court refused to give the eleventh and twelfth instructions asked by plaintiff in error. They need not be set out, as the eleventh is, in substance, covered by the first and second instructions given on behalf of plaintiff in error, and the substance of the twelfth is covered by the first, second, third and fourth instructions given.

The court refused to give instructions numbered thirteen and fourteen, asked by plaintiff in error, which are as follows :

"13. The jury are instructed that to enable the plaintiff to recover in this case, it must appear, by a preponderance of the evidence, that the negligent act or acts complained of were the proximate cause of said injuries. Therefore, if the jury believe from the evidence that the negligent act or acts complained of were not the proximate cause of said injuries, that is, that said acts were such that the injury to plaintiff might not have been foreseen or expected as a result thereof, then the jury should find the defendant not guilty.

"14. Even if the jury believe from the evidence that the defendant, the Metropolitan West Side Elevated Railroad Company, was guilty of negligence, as charged in the declaration, yet, if the jury believe from the evidence that subsequently to such negligent acts a new cause intervened sufficient to stand as the cause of the injury complained of, then the former must be considered too remote, and the jury should find the defendant, Metropolitan West Side Elevated Railroad Company, not guilty."

There was no error in refusing the thirteenth instruction

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for two reasons: First, because it is in substance covered by instruction number one given, and, second, because the definition therein contained of proximate cause is not accurate.

We think there was no error in refusing the fourteenth instruction, because there is no evidence of any new and intervening cause on which to base the instruction in that regard. The evidence as to two boys on the structure is not sufficient to show a new and intervening cause.

We are of opinion that the evidence of negligence on behalf of plaintiff in error was sufficient to justify the court in submitting the case to the jury, and we can not say that the verdict is manifestly against the evidence in that regard. No claim is made, and none could be made under the evidence, that defendant in error did not exercise ordinary care. There is no evidence from which it can be said that the boys seen on the elevated structure caused the bolt to fall. The only witness who testifies to having seen them, says they were about in the center of the street, above the center of Morgan street, and thus they were necessarily quite a distance from where the bolt was which fell upon defendant in error. Besides, it is not shown what they were doing. And even if this were not so, it appears from the evidence that the bolt in question was such as was used in the track-laying, which was done by the sub-contractors, for whose actions the Railroad Company is responsible. The jury was justified from the evidence in finding that the bolt must have been left lying loose upon the elevated structure, and that so doing was a negligent act, and that it was also negligence of the sub-contractors as well as that of the Railroad Company, under the supervision and direction of whose engineer the work was done, in not keeping boys off the structure, where they were liable to knock down anything lying loose upon the structure. Moreover, we think the jury was justified in finding from the evidence, which shows that the workmen were engaged in track-laying at about three blocks distant from the place of the accident, that the bolt was caused to fall by some

jarring of the structure—either by the operation of heavy machinery used in hoisting the rails, or by the striking of large and heavy sledges by the workmen upon the structure in the process of the track-laying, either of which things, common experience with work of this character teaches, is the usual, natural and ordinary course of procedure.

But if we are wrong in all these respects, still we are of opinion, the evidence showing, as it does, that the construction of the railroad was done by the contractor or his sub-contractors under the direction and supervision of the engineer of plaintiff in error, that this bolt was such as was used in the track-laying at the point in question; that defendant in error was passing along the sidewalk of Morgan street, in the exercise of ordinary care for her safety, and the bolt fell upon her from the railroad structure, causing the injury; this proof made a *prima facie* case of negligence, which it was incumbent on plaintiff in error to meet, and explain how the bolt came to fall. This explanation was not made, and in its absence we think the jury was justified in finding the verdict of guilty. *R. R. Co. v. Cotton*, 140 Ill. 486; *Hart v. Washington Pk. Club*, 157 Ill. 14, and cases cited; *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158; *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, and cases cited.

Being of opinion that there is no reversible error in the record, the judgment is affirmed.

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### Metropolitan West Side El. R. R. Co. v. Peter C. Dick.

1. CORPORATIONS—*When Liable for the Acts of Its Contractors, Lessees, etc.*—A corporation is liable for the tortious acts of a third person, when such person is the servant of the company and acting under its direction; and though such person is not a servant as between himself and the company, but a contractor or lessee, still he must be regarded as a servant when he is exercising some chartered privilege of the company, with its assent, which he could not have exercised independently of its charter.

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d104	63

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2. *SAME—Responsibility of, in Accepting a Special Charter.*—A company seeking and accepting a special charter must take the responsibility of seeing that no wrong is done through its chartered powers by persons to whom it has permitted their exercise.

3. *NEGLIGENCE—Of an Agent or Servant.*—If an agent or servant is guilty of negligence, resulting in an injury to another, in the performance of that which he was authorized to perform, the master or principal is liable to the injured party.

**Appeal** from the Criminal Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 5, 1900.

**Statement by the Court.**—This is error to reverse a judgment rendered in favor of defendant in error against plaintiff in error in case, for alleged negligence. The suit was against plaintiff in error, the West Side Construction Company, the Milwaukee Bridge Company, the Carnegie Steel Company, Limited, and J. G. Wagner. The cause was dismissed as to the Milwaukee Bridge Company, and discontinued by the court, on its own motion, as to J. G. Wagner, for want of service. The jury found plaintiff in error guilty, and by direction of the court, found the Carnegie Steel Company and the West Side Construction Company not guilty. The jury assessed the plaintiff's damages at the sum of \$5,000, and judgment was rendered for that sum.

Plaintiff in error was incorporated March 9, 1892, under the general railroad law to construct a railroad, the location of which is thus described in the articles of incorporation:

“Commencing at a point on the west shore of Lake Michigan, between the main branch of the Chicago river on the north, and Twelfth street, in the city of Chicago, county of Cook and State of Illinois, on the south; thence running in a westerly direction to the present limits of the town of Cicero, in said county and State, with a branch starting from the main line of said railroad, as above described, at a point on said main line between Jefferson street, in said city of Chicago, on the east, and Western avenue, in said city of Chicago, on the west, and running southerly and southeasterly to the present limits of the city of Chicago; and also with a branch starting from said main

line, at a point between the south branch of the Chicago river on the east, and Western avenue on the west, in said city of Chicago, and running northerly and northwesterly to the present city limits of the city of Chicago, with all necessary branches, switches, turntables, turnouts and curves along the line of the proposed railroad and the said branches thereof."

April 7, 1892, the city council of the city of Chicago passed an ordinance granting to the company the right to construct, maintain and operate, for a period of fifty years, an elevated railroad on certain lines designated in the ordinance, and over, along, upon and across such lots, lands and property as the company owned, or might thereafter acquire by lease, purchase, condemnation or otherwise; and also to cross, at an elevation, any and all streets, avenues, alleys, public places and railroad tracks, upon or along the line of the route designated in the ordinance.

April 25, 1892, the company entered into a written contract with Alfred F. Wolcott, by which he, Wolcott, agreed to procure the right of way for the road (the company to exercise its corporate rights and powers for that purpose, when requested), and also to equip the road. In consideration of Wolcott's agreement, the company agreed to pay to him, "or his assigns" an amount specified in the contract at the times and in the manner therein specified. The contract provided:

"All completed work shall, before delivery, acceptance and payment, be subject to examination and approval by the Railroad Company, by such engineer as may hereafter be mutually agreed upon by the parties hereto."

The number of miles on the main line and branches of the road is stated in the contract to be sixteen.

June 6, 1892, Alfred F. Wolcott, plaintiff in error consenting thereto, assigned their contract to the West Side Construction Company, a New Jersey corporation.

December 19, 1892, the West Side Construction Company made a contract in writing with the Carnegie Steel Company for the furnishing by the latter company of all the material and labor necessary to complete the steel superstructure of

the railroad in accordance with specifications attached to the contract, the work to be done "under the direction and inspection of the chief engineer of the Metropolitan West Side Elevated Railroad Company and of the company hereinafter named, the engineer, or of his assistants appointed to superintend the same, and to the full satisfaction and acceptance of the said engineer." Specifications of the work to be done were annexed to and made a part of the contract, and it was provided that the work should be done in strict conformity with such lines, levels, stakes, profiles, maps, plans and instructions as should from time to time be given by the engineer, or his assistants, for the guidance of contractors.

Alfred F. Wolcott, with whom plaintiff in error contracted, was the president of the West Side Construction Company, so that the contract with him was in effect a contract with the West Side Construction Company.

The Carnegie Steel Company made a contract with J. G. Wagner for the erection of the elevated structure.

Mr. Eckert was the engineer agreed on by plaintiff in error and the West Side Construction Company, and his sole business and all he did in the premises was to look over the work from time to time, as it progressed, and ascertain how much had been done, so that proper payments could be made, and neither Eckert, nor any officer or employe of plaintiff in error, exercised any supervision or control over the West Side Construction Company, or any of its sub-contractors, as to the manner in which the work should be done, or the employes whom they or either of them employed.

The main line of the road crossed Ogden avenue in the city of Chicago, and the part across that avenue was not fully completed until about August, 1893, up to which time the Carnegie Company or some of its sub-contractors were in possession of the structure at the crossing, and were working on it. July 21, 1893, while defendant in error was walking on the sidewalk on Ogden avenue under the elevated structure, a heavy piece of iron or steel, which two men, who were either in the employ of the Carnegie Com-

pany or the sub-contractors of that company, were moving, by means of a rope attached to each end of it, for the purpose of putting it in its proper place on the structure, fell on his foot and injured him. The piece of iron or steel which fell is described by the witnesses as a brace five or six feet long and weighing from twenty-five to fifty pounds. One witness says it weighed from twenty-five to forty pounds, another that it weighed in the neighborhood of fifty pounds. It fell from about the center of the structure.

Counsel for plaintiff in error say, in their argument:

"At the time of the accident, two employes of J. G. Wagner, the sub-contractor of the Carnegie Steel Company, were about to place in position the steel bar that fell. These men had a rope at each end of it, preparatory to fastening it in the structure."

The evidence is, that at the time of the accident there were no barricades or guards across the sidewalk to prevent people from passing under the structure, but a rope was placed across it the next day after the accident for that purpose. The falling brace or bar cut off substantially the big toe of defendant in error, and parts of his second and third toe. The big toe was amputated at the base, the second between the first and second joints, and the third at the first joint. Defendant in error was taken to the hospital, where he remained under treatment for eleven days, after which he was treated by a physician for four or five months. His treatment cost him about \$260. He was about thirty-one years of age at the time of the accident, and until about twenty days prior to that time, was a detective sergeant of police at a salary of \$1,200 per annum. He was unable to do any work after the injury for about twenty months.

IRA C. WOOD and ADDISON L. GARDNER, attorneys for plaintiff in error; W. W. GURLEY, of counsel.

JOHN P. AHRENS, attorney for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

Counsel for plaintiff in error contest all right of recovery

on two grounds, viz.: First, that the negligence, if any, was the negligence of the servants of an independent contractor over whom, and over the manner of doing the work, plaintiff in error had no control; secondly, that the negligence in permitting the brace or bar to fall, was not a necessary or direct result of the work authorized, but was merely collateral thereto.

It is obvious from the preceding statement that very valuable and important privileges were granted to plaintiff in error by its charter and the ordinance of the city of Chicago. The charter and ordinance being accepted and acted on by plaintiff in error, the law imposed on it certain obligations to the public, corresponding to the privileges conferred. Had the plaintiff in error itself constructed its railway, without the intervention of a contractor, and by its immediate servants, under the superintendence and direction of its own engineer, and had an accident happened such as the one in question, there would be no doubt of its liability. Having the authority, by its charter and the ordinance, to construct its railway, by its immediate servants, and being liable for any injury which might result to the person or property of another by reason of its negligence in constructing it, the question is, whether it could relieve itself from all liability for negligence in the construction of its railway by contracting with another corporation or person to construct it. In considering this question, it must be borne in mind that the sole authority to construct the railway is that vested in plaintiff in error by its charter and the ordinance of the city. If any one engaged in the erection of the structure should be sued or prosecuted for creating a nuisance in one of the streets by erecting the railway over it, he could only justify by pleading the charter and ordinance vesting authority in plaintiff in error to construct the railway, and averring that he was acting in pursuance of authority from plaintiff in error.

In *Leshner et al. v. The Wabash Navigation Co.*, 14 Ill. 85, the navigation company was authorized by its charter to enter on certain lands, including the lands of the plaintiff.

iffs in the action, and to take therefrom timber, stone and other materials necessary and proper for the construction of its works. The company made a contract with other parties to furnish, for a specified price, all the material for, and do all the work in the erection of a dam which, by its charter, it was authorized to erect. The parties with whom the company contracted entered upon the land of the plaintiffs, and took therefrom timber necessary and proper for the work, and used it in the work. The plaintiffs, the owners of the land, instituted proceedings against the navigation company to have their damages for the taking of the timber assessed, and the company defended on the ground that they had contracted, as heretofore stated, for the furnishing of material for the work for a specified price, and had paid the contractors. The court say :

“The contractors were none the less the servants of the company because they were doing the work by contract, and for a stipulated price. The work was still done by the company, and under the authority of their charter. The privileges which the charter conferred upon the company, to enable them to execute the work, devolved upon the contractors for the same purpose. The very erection of the dam across the river was an obstruction to its navigation and would have been unlawful but for the authority conferred by the charter.”

The court further say, *Ib.* 87 :

“Had a cause of action accrued to an individual by reason of the obstruction erected in the river, the company whose work it was, would have been liable as much as if they had erected it with their own hands.”

*Hinde et al. v. Wabash Navigation Co.*, 15 Ill. 72, is a similar case and to the same effect. In that case the court say :

“Although contractors, they were, when exercising the rights conferred by the charter, the agents or servants of the company,” etc.

In *C., St. P. & Fond du Lac R. R. Co. v. McCarthy*, 20 Ill. 385, the Railroad Company contracted with Page & Co. for the construction of its road. The contractors, in doing the work, entered on the land of the plaintiff, which

was on the line of the proposed road, and took down the fences at the points where the line of the road entered and left the land. They carelessly left the fences down while they were at work, in consequence of which cattle entered and damaged the growing crops of the plaintiff. The railroad company defended the action on the ground that the work was let to Page & Co., and that the negligence was that of their servants. Held, that this was no defense, the court saying :

“The contractors are the servants of the company, and authorized by law, being such servants, to enter upon the defendant's land and take down his fences, if necessary, but the company must be responsible for the consequences of the act. The contractors have no right there except through the grant to the company, and of course are the servants and agents of the company in doing that particular work. Their tortious acts are properly chargeable to the company.”

In *C. & Pac. R. R. Co. v. Whipple*, 22 Ill. 105, the plaintiff's cattle were killed by a train operated by contractors who were engaged in constructing the railroad company's road. The court held the company liable, and after citing prior cases, say :

“It then follows that the responsibility of the appellants was the same, whether the road, at the time the injury was done, was being operated by themselves, their servants, agents, lessees or the contractors for its construction.”

In *West v. St. L., V., etc., R. R. Co.*, 63 Ill. 549, the rule is thus stated :

“The principle we consider to be substantially this : The company must be held liable when the person doing the wrongful act is the servant of the company and acting under its direction, and though such person is not a servant, as between himself and the company, but merely a contractor or lessee, still he must be regarded as a servant or agent when he is exercising some chartered privilege or power of the company, with its assent, which he could not have exercised independently of the charter. In other words, *a company seeking and accepting a special charter, must take the responsibility of seeing that no wrong is done through its chartered powers by persons to whom it has permitted their exercise.*”

The last case is cited with approval, and the above quoted words in *italics* are quoted in *Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 147. The case first cited in this opinion was decided in 1852, and that last cited in 1897, so that for at least forty-five years the law of this State has been, that a contractor exercising the chartered power of a corporation, with its assent, must be regarded, in so far as the public and third persons are concerned, as the servant or agent of the corporation. In the present case, the work which was being done when defendant in error was injured, namely, the construction of the elevated structure across Odgen avenue, was work which plaintiff in error was authorized by its charter and the ordinance of the city of Chicago to do, and which could not, in the absence of such authority, have been lawfully done. Plaintiff in error not only assented to the doing of that work, but authorized it; those doing it were, according to the authorities cited, its servants or agents in doing the work; the injury occurred by reason of the negligence of such servants or agents in doing it, and the law that a master or principal is liable for injury occurring by reason of the negligence of his servant or agent in the performance of that which the master or principal authorized him to perform, is too well settled to require discussion. The Illinois court does not stand alone in the doctrine announced in the cases cited.

In *Hole v. Sittingbourne & S. Ry. Co.*, 6 Hurls. & Norm. 488, 1861, the railway company was authorized by act of Parliament to construct a bridge across the Swale, a public navigable channel, but in such manner as not to detain any vessel navigating the channel longer than ten minutes. The company contracted with one Withers for the construction of its line of railway, including the bridge. Before the bridge had been turned over to the company, a vessel navigating the channel was detained at the bridge, because, owing to its imperfect construction, it could not be opened. There was a verdict for the plaintiff, which was sustained by the Court of Exchequer. Pollock, C. B., says:



"This is a case in which the maxim, '*Qui facit per alium, facit per se*,' applies. When a person is authorized by act of Parliament, or bound by contract to do particular work, he can not avoid responsibility by contracting with another person to do that work," etc.

The company was held liable.

In *Mercey Docks v. Harbor Board of Trustees*, 1 Eng. & Irish Appeal Cases, 93, Mr. Justice Blackburn, delivering his opinion before the House of Lords, says :

"But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that, in making them, no unnecessary damage may be done." *Ib.* 112.

The same justice, in his opinion, quoted the following from the opinion of Mr. Justice Williams in *Pickard v. Smith*, 10 C. B. (N. S.), 480 :

"Unquestionably no one can be made liable for a breach of duty unless it be traceable to himself or his servants or servant in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not liable. That rule, however, is not applicable in cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent on his employer. If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it, furnishes no excuse, either in good sense or law." *Ib.* 114.

The other law lords, including the lord chancellor, concurred in the opinion of Mr. Justice Blackburn. The question is very ably discussed by Dwight, J., in *McCafferty v. Railway Co.*, 61 N. Y. 178, and many authorities cited.

That there are cases contrary to the views expressed in this opinion, must be admitted; but in view of the Illinois decisions cited, and which we think supported by the better reason, we think the question of the liability of a corporation for the negligence of its contractor, in the performance of work authorized by the charter of the corporation, and

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which the corporation authorized the contractor to perform, *res adjudicata* in this State.

While it is not, and indeed, can not, consistently with the evidence, be contended that the men engaged in the work were not performing work which was authorized to be done by the charter of plaintiff in error and the city ordinance, namely, attempting to place in position in the elevated structure the brace which fell and injured defendant in error, and while it is not contended that the permitting the brace to fall was not negligence, it is urged that the negligence was not a direct result of the work authorized, but was merely collateral thereto, and therefore there can be no recovery. If this proposition is sound in law, then no recovery can ever be had on account of injury resulting from the negligence of a servant or agent in the performance of an act which he was authorized by his master or principal to perform, because negligence is never authorized by master or principal. The proposition is utterly untenable. The law is that if the agent or servant is guilty of negligence resulting in injury to another, in the performance of that which he was authorized to perform, the master or principal is liable to the injured party.

In *C., St. P. & Fond du Lac R. R. Co. v. McCarthy*, *supra*, the contractors were authorized both by the charter and the railroad company to construct the railroad through the plaintiff's land, and, by necessary implication, to take down the fences. They were not, however, authorized to carelessly leave them down during most of the time they were at work, which they did. Yet it was held that the negligence of the contractors was tortious, and the railway company responsible. We think further discussion of this question superfluous.

It is claimed that the damages are excessive. The trial was fairly conducted, and although, if sitting as jurors, we might have awarded a less sum as damages, yet we can not, from the mere amount of the sum awarded, infer that the jury were influenced by any improper motive or consideration, in assessing the damages.

Counsel for plaintiff in error object to the third instruction for defendant in error, on the ground that it informed the jury that the servants of Wagner, who were engaged in working on the structure at the time of the accident, must be considered, as to the public, the servants of plaintiff in error. We have already held this to be the law.

The judgment will be affirmed.

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### Columbus Building and Loan Association et al. v. Joseph Kriete et al.

1. **BUILDING AND LOAN ASSOCIATIONS—No Power to Receive Deposits—*Ultra Vires*.**—Under the statutes (Hurd's Rev. Stats. 1895, Chap. 83, pages 415 to 419, Sec. 18) a building and loan association has no power to receive deposits or to borrow money and contract and to repay the same.

2. **SAME—Can Not Do a Banking Business.**—A building and loan association can not lawfully do what is practically a banking business by the receipt of deposits of money from and agreeing to pay interest thereon to persons who do not take stock in the association therefor.

3. **SAME—Books as Admissions.**—The books of a building and loan association, as between it and its stockholders, are evidence against the association as admissions.

4. **NOTICE—To Parties Dealing with Building and Loan Associations.**—A party dealing with a corporation having limited and delegated powers conferred by law, is chargeable with notice of such powers and limitations, and can not plead ignorance in avoidance of the defense of *ultra vires*.

5. **SAME—Payments to the Association.**—Where the secretary of the association is, under its by-laws, the person authorized to receive money, payments made to him are payments made to the association.

**Error to the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding.** Heard in this court at the October term, 1899. Reversed in part, affirmed in part, with directions. Opinion filed February 5, 1900.

**Statement by the Court.**—March 22, 1897, a bill was filed by a shareholder in the building association, plaintiff in error herein, for the appointment of a receiver of the

property of the association, because of its insolvency and violation of the statute in certain respects alleged, and asking that the affairs of the association be wound up and its assets, after the payment of its debts, distributed among the shareholders. A receiver was appointed, who qualified and entered upon his duties, and thereafter Joseph Kriete and forty-seven others, defendants in error herein, filed petitions, each of which, in substance, alleges that he deposited in said association certain sums of money, giving the dates and amounts of such deposits, which amounts, and each of them, the association promised to pay to petitioners, together with interest at six per cent per annum, and prays that claims may be allowed against said association for said amounts, respectively, and allowed as claims in favor of said petitioners, respectively, as outside creditors, and that the same be paid out of the funds in the hands of the receiver in full, after deducting the costs and charges of the administration of the estate of the association.

The receiver answered each of said petitions, denying the allegations thereof, and setting up that none of the petitioners were shareholders or members of the association; that whatever money they or either of them deposited was deposited with the secretary of the association individually, and denies that the association ever received any money from persons not members of the association, and says that the association was not authorized by law to receive money on deposit, or to borrow money and agree to pay interest thereon, other than to receive money on shares of stock; and that borrowing money by the association from persons not members thereof was *ultra vires*, and beyond the powers of the association as defined by its charter.

An order of reference of said petitions to a master of said court was made, directing him to take proofs and report his conclusions thereon of law and fact, and the master, after taking evidence, which is very voluminous, reported the same to the court with his conclusions. The master finds, among other things, that prior to the insolvency of the association Joseph Kriete, and twenty-seven others of said

petitioners (naming them), made deposits of cash in and withdrawals from said association, and that there was due to said petitioners so making such deposits the several amounts set opposite their names, respectively, which included interest, at five per cent per annum. The aggregate of such deposits, with interest, is about \$17,000. The master found that each of these twenty-eight petitioners made their respective deposits, not as stockholders of, but as loans to the association, the same to bear interest and to be returned on demand. He also found that they had liens for the amounts due them, respectively, superior to other creditors of the association, whose liens were for money due them on account of withdrawal values of stock.

The master also found that Albert Truka and nineteen others of said petitioners (naming them) owned stock in the association which matured prior to its insolvency, and was so declared by the directors and passbooks issued to them, and that there was due to these twenty petitioners (naming them) the several amounts set opposite their names, specifying such amounts, the aggregate of which was more than \$15,000. The master also found, as matter of law, that these last named stockholders had no better or prior lien on the assets of the association than other stockholders, whether their shares had matured or not.

On a hearing of exceptions to the report, all the findings of fact made by the master were approved and confirmed, but exceptions as to his conclusions of law as to the petitioners, Albert Truka and the nineteen others who were found to be stockholders of the association, were sustained, and the chancellor entered a decree in accordance with the master's report, both as to his conclusions as to fact and law as to Joseph Kriete and the twenty-seven other petitioners in his class, and directing that the receiver pay out of the first moneys coming into his hands, after the payment of expenses of administration, the several amounts found due said twenty-eight last mentioned petitioners, respectively, but directing that as to Albert Truka and the nineteen other petitioners in his class, whom the master

found were stockholders, although finding the facts the same as the master, decreed that these twenty petitioners (naming them) have liens upon the funds of the association for the respective amounts found due them, prior and superior to the claims of unmatured stockholders and members of the association, but subject to the costs of administration and the rights of outside creditors, and directed the receiver to pay their claims accordingly, prior to the payment of the claims of any stockholders whose claims were upon stock which had not matured prior to the insolvency of the association.

From this decree the association prosecutes this writ of error.

JAMES J. HOCH and HARRY P. SIMONTON, attorneys for plaintiffs in error; MUND & SIMONTON, of counsel.

A building and loan association organized under the laws of Illinois has no authority to borrow money or accept cash deposits. Such contract is *ultra vires*. Rhodes et al. v. Missouri S. & L. Co., 173 Ill. 621; Endlich on Building Associations (2d Ed.), Sec. 275.

A building and loan association has no power to borrow money for the purpose of loaning it, since the money to be loaned by such association can only be properly accumulated by dues, fines, premiums and interest. State v. Oberlin B. & L. Ass'n, 35 O. St. 258.

The acceptance of "cash deposits," without the authority and direction of the directors of a building and loan association, is not, in the absence of a by-law granting such authority, within the scope of the authority of a secretary of such association. Endlich on Building Associations (2d Ed.), Sec. 174.

A secretary of a building and loan association can not, under any circumstances, bind the society against its will, by its single-handed acts, where they are either *ultra vires* of the association or clearly such as are beyond the ordinary functions of the office, and therefore require the consent of the board of directors. Endlich on Building Associations (2d Ed.), Sec. 174.

Third persons dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They can not rely upon the agent's admissions of authority, but are to be regarded as dealing with the power before them, and must, at their peril, observe that the acts done by the agent are legally identical with the acts authorized by the power. *Baxter v. Lamont*, 60 Ill. 237; *Abrahams v. Weiller*, 87 Ill. 179; *Endlich on Building Associations* (2d Ed.), Secs. 230, 231, 233; *Thompson on Corporations*, Sec. 4, 886-7; *Morawetz on Corporations*, Vol. 1, Sec. 531.

Where third parties deliver money to an ostensible agent of a corporation, the receipt of such money being beyond the power and authority of the agent, such third parties make the agent receiving the same their agent for the transmission of the money to the corporation, and the corporation is not liable if the agent embezzles the same and the money does not reach the coffers of the corporation. *Manhattan Co. v. Lydig, & Johns*. (N. Y.) 377.

SIDNEY C. EASTMAN and EDMUND FURTHMANN, attorneys for defendants in error.

A building and loan association organized under the laws of Illinois has authority to borrow money. *Grommes et al. v. Sullivan*, 81 Fed. Rep. 47.

Under the statute (R. S. Ill.), Chap. 32, entitled "Loan Associations," Sections 69-81, the plaintiff in error was empowered by implication to incur debt in various ways:

To its secretary for his services.

To withdrawing members.

To the representatives or beneficiaries of deceased members.

To strangers of the association for stationery, office supplies, office rent, and for real estate to be used as a place of business.

By express provision it was authorized:

"To purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate in which it had an interest, and the real estate so purchased,

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to sell, etc., convey, lease or mortgage at pleasure, to any person or persons whatsoever." Ill. Rev. Stat., Chap. 32, Sec. 81.

This power to mortgage its real estate imported necessarily the power to borrow or in some way to become indebted. *Grommes et al. v. Sullivan*, 81 Fed. 47.

The association, having the power to become indebted, to borrow money, is estopped to raise the question of *ultra vires*, because it has received the benefit of the contract in receiving the deposits from defendants in error. *National Home Building Association v. Bank*, 181 Ill. 43; *Ottawa P. R. Co. v. Murray*, 15 Ill. 336; *Bradley v. Bullard*, 55 Ill. 413; *Darst v. Gale*, 83 Ill. 136; *Kadish v. Garden City L. & B. Ass'n*, 151 Ill. 531; *McNulta v. Corn Belt Bk.*, 164 Ill. 427; *Eckman v. C., B. & Q. R. R.*, 169 Ill. 312.

If agents conduct themselves so that, if they had been acting for private employers, the person for whom they were acting would have been affected and bound by their conduct, the same rule must prevail when the principal under whom the agent acts is a corporation. *Insurance Co. v. Schettler*, 38 Ill. 166; *Inter-State Building Association v. Ayres*, 177 Ill. 9; *Merchants' Bank v. Bank*, 10 Wall. 604; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Railroad Co. v. Quigby*, 21 How. 202; *Bank v. Graham*, 100 U. S. 699; *Henderson v. Railroad Co.*, 17 Tex. 560; *Rolling Mill Co. v. State*, 54 Ga. 635; *Frankfort Bank v. Johnson*, 24 Me. 490; *Allison v. Railroad Co.*, 46 S. W. Rep. 348.

A corporation, like a private individual, may by its acts ratify the unauthorized transactions of its agents. *Drescher v. Fulhem*, 52 Pac. Rep. 685; *Miller v. Matthews*, 40 Atl. Rep. 176; *Ragiand v. McFall*, 137 Ill. 81.

When the officers or agents of a corporation exercise powers affecting the interests of third parties, which presupposes a delegated authority for that purpose, and other acts subsequently performed show the corporation must have contemplated the legal existence of such authority, the acts of such officers or agents will be deemed right-ful and the delegated authority will be presumed. *Insur-*



ance Co. v. Schettler, 38 Ill. 166; Railroad v. Dalby, 19 Id. 353; Miners' Ditch v. Zellerbach, 37 Cal. 543; Metropole Bath Co. v. Fan Co., 50 Ill. App. 681; Supervisors v. Schenck, 5 Wall. 772; Insurance Co. v. White, 106 Ill. 67; Railroad Co. v. Schuyler, 34 N. Y. 58; Page v. Water Co., 31 Fed. Rep. 257.

If it is possible, under any hypothetical condition of facts, for an act to be within the express or implied power of a corporation, the corporation will be estopped in a particular instance to say that the act is not within such expressed or implied power, when such a defense would be to the injury of a party contracting with it, unless the act itself is *malum prohibitum* or *malum in se*. Bissell v. Railroad Co., 22 N. Y. 258; Railroad Co. v. Schuyler, 34 Id. 30; Grommes v. Sullivan, 81 Fed. Rep. 45; Supervisors v. Schenck, 5 Wall. 772; Railroad Co. v. McCarthy, 96 U. S. 258; State Board of Agriculture v. Railway Co., 47 Ind. 407; Miners' Ditch v. Zellerbach, 37 Cal. 543.

The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong. Kadish v. Building Association, 151 Ill. 531; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Darst v. Gale, 83 Ill. 136; Railway Co. v. McCarthy, 96 U. S. 258; San Antonio v. Mehaffy, Id. 312.

When a party dealing with a corporation has acted in good faith, and the contract has been completely executed, the corporation receiving the benefit thereof, and nothing remains to be done except the payment by the corporation to the party, the corporation is always estopped to set up its want of authority as a defense, unless the transaction is *malum in se* or *malum prohibitum*. This is always the law, even though the party contracting with the corporation knows at the time that the corporation is transacting business beyond its chartered powers. Bradley v. Ballard, 55 Ill. 413; Parish v. Wheeler, 22 N. Y. 494; Towers Excelsior Co. v. Inman, 23 S. E. Rep. 418; Eckman v. Railroad Co., 169 Ill. 312; Kadish v. Building Association, 151 Id. 531; Darst

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v. Gale, 83 Id. 136; Sioux City Terminal Co. v. Trust Co., 82 Fed. Rep. 124; Lyon v. Bank, 85 Id. 120; Central Trust Co. v. Railway Co., 87 Id. 815; Speer v. Commissioners, 88 Id. 749; Railroad Co. v. Thompson, 103 Ill. 187; Dimpfel v. Railway Co., 9 Biss. 127; Union Trust Co. v. Railroad Co., 117 U. S. 434; Bank v. Matthews, 98 Id. 621.

The secretary, under the by-laws, was the only authorized officer to receive money. The association having the power to become indebted, to borrow money, etc., the payment to the secretary was payment to the association. *Prairie State Association v. Nubling*, 170 Ill. 245.

MR. JUSTICE WINDES, after making the above statement, delivered the opinion of the court.

Defendants in error have moved to strike from the record the certificate of evidence for divers reasons which can not be here stated without needlessly extending this opinion. It seems sufficient to say that we have examined each and all the reasons assigned, are of opinion they are not well taken, and overrule the motion; and besides, the conclusion reached by the court would in no way be affected to the detriment of defendants in error by overruling the motion.

The evidence, in our opinion, sustains all the findings of fact of the master and of the chancellor, except as to the finding that Joseph Kriete and the twenty-seven other petitioners in his class made deposits in and withdrawals from the association of the respective amounts stated in the master's report and decree, as to which finding we are of the opinion it is not sustained by the evidence; but all these deposits are shown, by the clear weight of the evidence, to have been made with David Sachel, secretary of the association, individually, with the belief on the part of each of the petitioners that they were dealing with the association through the secretary. It is not shown that any of these deposits ever went into the treasury of the association, or that they were ever used by the association. In fact, the preponderance of the evidence is that the association received none of this money. Also except as to when the insolvency

of the association occurred, and as to when the stock of Albert Truka and the nineteen other stockholders matured, and as to whether their stock was declared by the association to have matured prior to the insolvency of the association. As to these latter matters we are not prepared to say, after a careful and critical examination of the evidence, that the findings of the master and the court are manifestly against the evidence, and therefore as to these matters, which are not manifestly against the weight of the evidence, the finding of the master, the same being approved by the court, should not be disturbed by a court of review. *Delaney v. Delaney*, 175 Ill. 188; *Biggerstaff v. Biggerstaff*, 180 Ill. 407; *Village of Itasca v. Schroeder*, 182 Ill. 192.

As to the finding first above mentioned, that the deposits were made with the association by Joseph Kriete and the twenty-seven other petitioners in his class, we are of opinion that it is immaterial, under the law as hereinafter stated, whether such deposits were made with the association, or whether the association received and appropriated the money or not, or whether the deposits were made with Sachel as an individual.

A reference to the statute concerning building associations, which was in force at the time when the deposits in question were made, to wit, in the year 1897, and prior thereto (*Hurd's Revised Stat. 1895*, Chap. 32, Secs. 1 and 13), will show that it gives to the association no power whatever to receive deposits or to borrow money and contract to repay the same. In other words, for a building association to do what is practically a banking business by the receipt of deposits of money from and agreeing to pay interest thereon to persons who do not take stock in the association therefor, is wholly foreign to any power given to such an association by the statute, and is therefore *ultra vires*.

In the case of *National Home Building Association v. Home Savings Bank*, 181 Ill. 35, in which the question was to the power of a building association to acquire and hold real estate in which it had no interest, it was held that such power was wholly *ultra vires*. The court say :

"A party dealing with a corporation having limited and delegated powers conferred by law, is chargeable with notice of them and their limitations, and can not plead ignorance in avoidance of the defense" (citing cases).

And the court further say, with reference to the question of estoppel, which is in the case at bar so earnestly pressed by counsel for defendant in error:

"The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers." Citing and reviewing divers cases in the Supreme Court.

The court also say:

"In this case the transaction was beyond the corporate powers and *ultra vires* in the strict and legitimate sense, and against public policy. It could not be ratified or become valid by acquiescence since there was no power to make it. Flora D. Bishopp, who dealt with the corporation, was chargeable with notice of its powers and their limitation, and its inability to enter into the contract. She could not make the void contract valid by acting under it. No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it can not be done by affirming or enforcing the contract, but in some other manner."

We are of opinion that this ruling of the Supreme Court is conclusive against the right of the petitioners, Joseph Kriete and the twenty-seven others in his class, to recover for their deposits, even if made with the association as found by the master and the court, because the association was absolutely without power to make any such contracts, and of this petitioners are chargeable with notice. And if we are correct in saying that the evidence shows that none of these twenty-eight petitioners' money ever came to the possession and was never used by the association, then there is no basis for them to recover, even upon the theory of counsel for defendant in error, that the association, having the power for some purposes to become indebted for money borrowed, would be estopped from setting up the defense of *ultra vires*.

No point is made by plaintiff in error that the findings

of the master, as to the nature of the business transacted between any of the petitioners and the association, or with the secretary, Sachel, nor as to the amounts of the several balances found to be due the several petitioners, respectively, but the only claim made is that the evidence does not support such findings as to the petitioners, Albert Truka and the nineteen other stockholders in his class, as to the maturity of their stock, whether it was declared matured prior to the insolvency of the association, and as to when that insolvency occurred. The evidence bearing on these matters is so voluminous that we can not undertake in an opinion to set out even the substance of it, and we might be content with merely stating our conclusion as above, were it not, in our opinion, important to call attention specifically to a portion of the evidence in the record and the position assumed by counsel for plaintiff in error.

It appears from the account books of the association, which are in evidence, that at all times up to and long after Truka and the nineteen other petitioners in his class made their last payments upon stock purchased by them, that the association had a large cash surplus which was amply sufficient, with the other assets of the association, to make it solvent, and also that while the association thus appears by its books to have been solvent, the same books show that the stock of these petitioners matured and was paid up in full. This evidence of payment is overcome by proof on behalf of petitioners, but the evidence as to the maturity of the stock is not. Counsel for the association do not in their brief contend that the association did not recognize these twenty petitioners as holding matured stock, but only that they did not make strict and technical proof of the actual maturity of their stock.

The fact of the insolvency of the association does not appear to have been shown until about the time of the filing of the bill in this case, which was long after the maturity of the stock of these twenty petitioners, as shown by the proof in the case. The solvency of the association was thus *prima facie* established, and it will be presumed to continue

until such time as insolvency was shown. The books of the association, as between it and its stockholders, are evidence against the association as admissions. Jones on Evidence, Secs. 272 and 530, and cases cited; Holden v. Hoyt, 134 Mass. 181, 184.

It was, then, in view of this *prima facie* proof, incumbent upon the association to show that it became insolvent before the maturity of the stock of these twenty petitioners, and before it was declared by the association to have matured, in order to maintain its defense. On this record it seems that could only be done by showing when the secretary, Sachel, appropriated to his own use and embezzled the large cash surplus which was shown by its books to have been on hand. When this appropriation or embezzlement took place does not appear, in fact, counsel for the association in their brief concede it was not proved, and we therefore say that the finding of the master and the court that the maturity of the stock of these twenty petitioners took place prior to the insolvency of the association, and was so declared by the association, is not manifestly against the evidence. And in this connection it should also be noted that the passbooks issued to most of these petitioners by the association, as well as the account books of the association, show that these twenty petitioners were treated as holders of matured stock; and the other evidence shows that all of the payments of money made by them or each of them were made to the secretary of the association, who was, under its by-laws, the person authorized to receive this money. Under such circumstances, payments made to the secretary were payments made to the association. *Prairie State L. Ass'n v. Nubling*, 170 Ill. 245.

The finding and decree of the court that these twenty petitioners were entitled to priority over the other stockholders in the association whose stock had not matured, was, in our opinion, correct. Endlich on Building Associations, Sec. 486; 7 Thompson on Corporations, Sec. 8736; *Young v. Stevenson*, 180 Ill. 608-14; *Rickert v. Suddard*, 80 Ill. App. 204.

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The decree of the Superior Court, in so far as it gives a first and prior lien to the petitioners, Joseph Kriete and the twenty-seven others in his class, is reversed, with directions to dismiss each of these twenty-eight petitions for want of equity, and the decree as to Albert Truka and the nineteen other petitioners in his class, is affirmed. The costs of this appeal shall be paid from any funds of the association in the receiver's hands.

Reversed in part and affirmed in part, with directions.

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**Thomas Kelly et al. v. Fanny D. Galbraith, Executrix,  
et al.**

1. **MISTAKES—Power of Equity to Reform.**—Courts of equity have power to reform an instrument for a mistake of fact, but the mistake must be mutual or common to both parties, and must be proven by clear and satisfactory evidence.

2. **EQUITY PRACTICE—When Too Late to Raise the Point that There is an Adequate Remedy at Law.**—The point that there is an adequate remedy at law and no ground for the intervention of equity not having been raised in the court below, can not be raised in a court of review for the first time.

3. **SAME—Supplemental Bills, When Proper.**—The general rule is that new matter arising after the commencement of the suit, must be brought before the court by supplemental bill, if such new matter is to be made the basis of distinct relief.

4. **SAME—The Rule Relaxed as to Supplemental Bills.**—In modern practice the rule as applied to accountings is relaxed so as to permit them to cover periods *pendente lite* and down to the time of the decree.

5. **SAME—Relief Not Necessarily Limited to the Facts Existing at the Commencement of the Suit.**—While it is true that in suits in equity the right to decree is not limited to the facts as they existed at the commencement of the suit, and the relief administered may be such as the nature of the case and the facts as they exist at the close of the litigation demand, yet it is the established rule of chancery practice that such of the facts as have arisen after the bill is filed, if made the basis of relief, must be presented to the court by supplemental bill.

**Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 5, 1900.**

**Statement.**—Appellees filed their bill of complaint to obtain reformation of a lease and a decree for the amount of rent due thereunder. The following facts were set forth by the allegations of the bill: That Galbraith, the testator of appellees, was possessed of premises at corner of Franklin and Madison streets, in the city of Chicago, upon which was located a store and warehouse building. In 1892 he undertook the reconstruction of the building by dividing it into separate stores, and while the process of reconstruction was going on he demised to appellants one of these separate stores. At the time of the leasing, street numbers had not been given to the new stores. In the written lease executed by the parties the premises demised were described as No. 129 Franklin street. It is alleged that the description written in the lease before it was executed contained the further description, “the first store and basement north of the main entrance on Franklin street.” It is alleged that the store which was afterward numbered 123 Franklin street is the store which the parties to the lease contemplated; that it is the first store and basement north of the main entrance of the building on Franklin street, and that the description “No. 129” written in the lease is a mistake of the scrivener. It is also alleged that by mistake the word “he” is written in the lease instead of the word “they.”

The bill further alleges that appellants entered into the possession of No. 123 Franklin street and occupied it under the lease; that appellants have paid rent for these premises according to the terms of the lease from May 1, 1892, to and including December 31, 1894; that at the time of filing the bill of complaint, viz., March 5, 1895, there was due to appellees from appellants, rent under the terms of the lease for the months of January, February and March, 1895, and that appellants have refused to pay the same. It is further alleged that there was not, in fact, previous to and at the time of the leasing, and never has been, such a street number as No. 129 Franklin street, and that there are in fact no premises known as such in the city of Chicago; that the lessor relied upon the written lease as being correct, as the lease agreed upon between the parties; that he never



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discovered the mistake until the 14th of February, 1895, when it was discovered by the complainants' agents; that since the discovery they have requested appellants to join in the correction of the lease, and that such request has been refused.

The relief prayed was the correction of the mistake and the reformation of the lease so that the description of the property demised therein would read, "the store and basement known as 123 Franklin street, Chicago, Illinois," and by changing the word "he" to "they" in one of the covenants. There was also a prayer that the appellants be decreed to pay all the rents due and unpaid at the time of the rendering of a decree.

The answer of appellants to the bill of complaint in effect sets up that the lease when executed contained only the description "No. 129 Franklin street;" that such description was not inserted by mistake; that the further description, "the first store and basement north of the main entrance on Franklin street," was interpolated after the lease was executed by appellants; that the premises contemplated by the parties to the demise were not the premises 123 Franklin street, but were premises which were never constructed, by reason of a change in the plan of reconstruction made after the execution of the lease. The answer admits occupancy of premises No. 123 Franklin street, payment of rent as required by the written lease, and refusal to pay rent for months of January, February and March, 1895.

After replication the cause was referred to a master in chancery.

The master in chancery reported conclusions of facts supporting the allegations of the bill of complaint in every material allegation. The decree confirmed the master's report and ordered the reformation of the lease as prayed. It also ordered that the appellants pay to appellees the sum of \$4,549, the rent due from January 1, 1895, to the 30th day of April, 1897, with interest.

Among the findings of fact of the decree are the following:

That No. 129 Franklin street described no premises whatever; that the number was inserted in the lease in error and was a mistake; that the respective parties, by their action, construed the description in the lease, and adopted the premises afterward known and described as No. 123 Franklin street, as being in fact the premises described in the lease; and that the premises described therein as the first north of the entrance on Franklin street were the premises actually taken and occupied by defendants under the lease.

From the decree this appeal is prosecuted.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellants.

GEO. A. GARY, attorney for appellees; F. J. PARTRIDGE, of counsel.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

It is in effect contended by counsel for appellants that the findings of fact of the decree are not sustained by the evidence. After a careful examination of all the evidence we are of opinion that it does amply sustain the decree. The master in chancery and the chancellor have found that the description, "the first store and basement north of the main entrance on Franklin street," was contained in the lease at the time it was executed.

It is beyond dispute that the first store and basement north of the main entrance on Franklin street is not No. 129 Franklin street, and is No. 123 Franklin street. If the parties to the lease contemplated a demising of the first store and basement north of the main entrance in Franklin street, then it follows that the description No. 129 Franklin street in the lease is a mistake. That they did contemplate precisely these premises in making the lease is established beyond reasonable question. The evidence discloses that during the reconstruction of the building appellants' representative examined these premises, designated work to be done and changes to be made upon that particular store, and

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that after the stores were completed appellants moved into the store No. 123 Franklin street, the first store and basement north of the main entrance, and occupied it without protest or complaint until this controversy arose. After having paid the rent stipulated by the terms of the lease for more than two years, they then, for the first time, raised a question as to the identity of the premises occupied by them with the premises which they had supposed they were obtaining by the lease. The allegations of the bill of complaint are amply established. The description, No. 129 Franklin street, was a mistake of the scrivener, and the evidence establishing this fact is clear, convincing and satisfactory. Questions raised as to whether the mistake was a mutual mistake of the parties are answered by the foregoing findings of fact. If each party intended that No. 123 Franklin street, which is the store located next north of the main entrance, was being demised, and the scrivener wrote into the lease as a description thereof the words No. 129 Franklin street, it was clearly a mistake mutual and common to both parties. If it were true that, in spite of this mistake in the lease, the appellants might recover rent upon it in an action at law, and hence that, having an adequate remedy at law, there was no ground for the intervention of equity, yet this ground of objection not having been raised in the court below, can not be raised here for the first time. When the subject is a proper one for equity jurisdiction, then, although there be a remedy at law which is adequate, this objection is waived if not made in the trial court. The matter of reforming a mistake of this nature is a matter proper for equitable cognizance, and therefore the objection that there was an adequate remedy at law comes now too late.

There is another question raised by counsel for appellants, which is not without difficulty. The decree ordered payment of rent, not only such as had accrued before the filing of the bill of complaint, but also rent which had accrued during the pendency of the suit. No supplemental bill was filed. It is contended by counsel for appellants that this new ground of recovery, which had arisen after

the filing of the original bill, could not be made the basis of distinct, affirmative relief without a supplemental bill. On the other hand, the counsel for appellees contend that equity jurisdiction having once attached, the court, having the subject-matter before it, could proceed to do complete justice between the parties, even to the including of matters arising subsequent to the filing of the bill, and without necessity of supplemental bill. There is apparent authority to support each contention. The general rule is doubtless that new matter, arising after the commencement of the suit, must be brought before the court by supplemental bill if such new matter is to be made the basis of distinct relief. In the early decisions this rule was adhered to with great strictness. In later practice it was relaxed, as applied to accountings, so as to permit accountings to cover periods *pendente lite* and down to the time of the decree. *Barfield v. Kelly*, 4 Russ. 355.

This relaxation of the rule in modern practice has been applied also to suits for foreclosure of mortgages. *Brown v. Miner*, 21 Ill. App. 60; affirmed in 128 Ill. 148; *Rhodes v. The M. S. & L. Co.*, 63 Ill. App. 77; *Lowenstein v. Rapp*, 67 Ill. App. 678.

The question is presented as to whether the rule has been so far relaxed or abandoned that in this case the court might decree a recovery of rent which was not due when the bill was filed, but became due subsequently, and this, upon the allegations of the original bill of complaint, without a supplemental bill. No accounting is prayed for by the bill or ordered by the decree. The bill simply prays for a money judgment. The original bill prayed for a decree for all rent which might be due at the time of decree, but it did not, as it could not, allege a condition of facts which would make such rent recoverable. On the filing of the bill it was not known, and could not be, whether rent would ever become due for the months which were *in futuro*. A leasing to another, destruction of the building, or other contingencies, might prevent any ground of recovery from ever accruing. If the rule as to pleading new matter, aris-

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ing after bill filed, has any force whatever in our present practice, it would seem that these matters could not have been properly made part of the original bill by a sort of anticipatory pleading, but should have been presented by a supplemental bill. The decree finds rent due for the months after the bill of complaint was filed, and gives judgment therefor. There is no allegation contained in the bill that such amounts are due, and the decree is therefore without any allegation to support it in this behalf.

While it is true that in suits in equity the right to decree is not limited to the facts as they existed at the commencement of the suit, and the relief administered may be such as the nature of the case and the facts, as they exist at the close of the litigation, demand, yet it is the established rule of chancery practice that such of the facts as have arisen after the bill is filed must, if made the basis of relief, be presented to the court by supplemental bill. *Burke v. Smith*, 15 Ill. 158; *Mix v. Beach*, 46 Ill. 311; *Fahs v. Roberts*, 54 Ill. 192; *Miller v. Cook*, 135 Ill. 190; *Hughes v. Carne*, *Idem*, 519; *McDonald v. Asay*, 139 Ill. 123; *Fisher v. Holdem*, 84 Mich. 494; *Candler v. Pettitt*, 1 Paige, 168; *Stafford v. Howlett*, *Idem*, 200; *Wray v. Hutchinson*, 2 Myl. & K. 235.

If the suit for this rent had been brought at law, where it perhaps should have been brought (*Bulkley v. Devine*, 127 Ill. 406), and must have been if insisted upon below, no rent could have been recovered except such as had accrued before suit brought. Having selected a court of equity and succeeded in maintaining the suit there, appellees should be held to comply with the rules of chancery practice.

The fact that appellants participated in the hearing before the master is of no consequence, for the difficulty is that decree for subsequent rent is based upon facts not alleged.

The writer is of opinion that the decree should, to this extent, be reversed, and otherwise affirmed. The majority of the court being of opinion that the decree should be altogether approved, it is affirmed.

JUSTICE WINDES and JUSTICE ADAMS concurring.

After the making of the original master's report and before the entry of the final decree, on motion of complainants and notice to defendants, the chancellor referred the cause back for the sole purpose of taking evidence in regard to the payment or non-payment of rent by the defendants "since December, 1894, for the premises mentioned and described in the bill," etc., and directing the master to make "his finding as to said fact of payment or non-payment of said rent and the amount of rent due from said defendants to said complainants for said premises," etc.

Also after the order of reference was made, defendants asked to file an amended answer, which was refused, and the order of re-reference was amended so as to require the master "to take evidence and ascertain and report to the court the amount of rent due the complainant, under the lease in question in said cause, up to the date of making his report under this order. And that at the hearing before said master the defendants shall be allowed and permitted to make any and all defenses, legal or equitable, which they may have as to the rent due and unpaid under the terms of said lease except so far as such defenses are inconsistent with the findings of said master in his report heretofore made to this court upon any other matter than the amount of rent due under said lease."

On the re-reference, besides the evidence offered by complainant, defendants offered evidence tending to show a vacation and surrender of the demised premises to the agent of complainant on April 30, 1895, which was about four months after the time to which they had paid rent, and the master found that they did vacate the premises, but "without any sufficient reason therefor." The full terms of the lease are set up in the original bill, and it prays for a decree for all rents which shall have accrued and remain unpaid at the time of entering the decree.

It will thus be seen that the defendants, appellants herein, have had every opportunity which could possibly have been afforded them by the most specific and technical pleading,

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of presenting any defense which they had to the claim of complainant for rent which became due after the filing of the bill. The general rule is, no doubt, that relief given must be based upon allegations made, but the Supreme Court has made exceptions to the rule, as have also other courts of the highest respectability. Besides the cases of accounting and in the foreclosure of mortgages mentioned by Mr. Presiding Justice Sears in his opinion, the following cases, relating to other and quite different subjects of relief, recognize exceptions to the rule, viz.: *Brown v. Minor*, 128 Ill. 157; *Sherman v. Foster*, 158 N. Y. 587-93; and cases cited; *Peck v. Goodberlett*, 109 N. Y. 180-9; *Worrall v. Munn*, 38 N. Y. 137-48.

If it was an error to decree the payment of the rent which became due after the filing of the bill, it was error without prejudice, and therefore can not avail appellants.

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**Frank B. Utley and Charles M. McMahon v. William A. Cameron, Trustee.**

1. **PRACTICE—*Motions to Set Aside Defaults.***—The court has no jurisdiction of a motion to set aside a judgment rendered at the next preceding term, except on some ground which would be sufficient for setting it aside on writ of error *coram nobis*.

2. **PRESUMPTIONS—*That the Court Acted Correctly.***—Where the record fails to show to the contrary the presumption is that the court below acted correctly, and will prevail until an error is shown to have been committed.

3. **ERROR CORAM NOBIS—*What May be Assigned Upon.***—Only errors of fact may be assigned in support of a writ of error *coram nobis*.

Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HASECY, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 5, 1900.

BURRAS & WILCOXON, attorneys for plaintiffs in error.

PARKER & PAIN, attorneys for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

Defendant in error sued plaintiffs in error in assumpsit for the alleged breach of a written contract. Summons issued September 8, 1898, returnable to the September term, 1898, of the court, which term commenced September 19th. Service was had on Frank R. Utley September 8th, and on Charles M. McMahon, the other plaintiff in error, September 12, 1898. October 12, 1898, an order was entered extending the time to file appearance or plead to October 20, 1898. The transcript, under date October 20, 1898, contains the following :

"And afterwards, to wit, on the 20th day of October, A. D. 1898, two certain demurrers were filed in the office of the clerk of said court by Burras and Wilcoxon. And thereupon, on the same day, to wit, the 20th day of October, A. D. 1898, a certain appearance of Utley and McMahon was filed in the office of the clerk of said court by Burras and Wilcoxon."

October 20, 1898, an order defaulting plaintiffs in error for want of a plea was entered, and November 19, 1898, at the October term, 1898, of the court, the court assessed the damages of defendant in error at the sum of \$2,000, and rendered judgment accordingly. December 17, 1898, the same being one of the days of the November term, 1898, of the court, plaintiffs in error moved the court "to amend the record herein by expunging therefrom the order entered herein October 20, 1898, defaulting them for want of a plea, and to set aside the judgment rendered herein on said order of default November 19, 1898, to recall the execution issued upon said judgment, and to release any levy that may have been made by virtue of said execution."

In support of this motion plaintiffs in error filed the affidavits of H. T. Wilcoxon and Charles H. Burras. Wilcoxon deposed, in substance, that the affiant is a member of the firm of Burras & Wilcoxon, attorneys for Utley and McMahon; that October 15, 1898, he prepared separate general demurrers to the declaration for each of said parties, and left them with Charles H. Burras, his partner; that he left the city of Chicago October 15, 1898, and returned October



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20, 1898, and on his return asked Burras, his partner, whether he had filed the demurrers, and Burras said he had; that affiant had no knowledge of the order of default, or of the final judgment, till December 10, 1898, when he called on the attorneys for defendant in error to procure from them a stipulation to set aside the default; that they not being in, he again called on them December 12, 1898, to procure such stipulation; when they informed him that they would look into the record and, if satisfied that it should be done, they would sign such stipulation; that December 13, 1898, said attorneys refused to sign the stipulation. Affiant further says that the register in the office of the clerk of the court shows that appearances of and separate demurrers for Utley and McMahon were filed by their attorneys, Burras & Wilcoxon, October 20, 1898, and that the office docket of Burras & Wilcoxon shows that said appearances and demurrers were filed October 20, 1898, and that affiant is informed by Burras and believes that said appearances and demurrers were so filed before the hour of 9:30 A. M., and before the opening of court, October 20, 1898.

C. H. Burras deposes that October 20, 1898, before the hour of 9:30 A. M., and before the opening of court, he filed with the clerk the appearances of Utley and McMahon, and also separate demurrers to the declaration for each of them, and that he had no knowledge of the order of default or final judgment until December 20, 1898, and had no occasion to examine and did not examine the files after October 20, 1898. This affidavit was sworn to December 14, 1898.

Following the last mentioned affidavit, in the bill of exceptions, is another affidavit of C. H. Burras, which purports to set up defense on the merits, the jurat to which affidavit is as follows:

"Subscribed and sworn to before me this 21st day of December, 1898.

[SEAL.]

C. H. BURRAS,  
H. H. CAZIER,  
Notary Public."

December 17, 1898, the court overruled the motion of plaintiffs in error to expunge from the record the order of

default, and set aside the judgment, etc., and to reverse this ruling is the object of this suit.

The motion having been made at the November term, 1898, of the court, the court had no jurisdiction to set aside the judgment rendered at the next preceding October term, except on some ground which would be sufficient for setting it aside on writ of error *coram nobis*. Counsel for plaintiffs in error contend that there is such ground, citing *Lyon v. Barney*, 1 Scam. 387. In that case the court says:

"The record, which is our only means of ascertaining the facts in the cause, shows the plea to have been entered previous to the rendition of the judgment. In order of time it precedes the judgment on the record, and no presumption can be raised to contradict the record."

It is evident from the language quoted that there was a plea in the record of the case cited, and also that the court was able to determine from the record that the plea was filed before judgment was rendered. In the present case there is no demurrer in the record, nor are we able to determine from the record that there was a demurrer filed before the order was entered defaulting plaintiffs in error. The entry, "two certain demurrers were filed," etc., is under the date October 20, 1898. Next after this entry in the record, under the date November 19, 1898, is the assessment of damages at the sum of \$2,000, and final judgment therefor, and next after the final judgment, under date October 20, 1898, is the defaulting order. Counsel contend that, although the entry that demurrers were filed and the entry of the order of default were made on the same day, yet, as the former precedes the latter in the transcript, it must be presumed that it preceded the latter in point of time; but it conclusively appears from the transcript that the proceedings do not appear in it in the chronological order in which they occurred. The final judgment was rendered November 19, 1898, yet in the transcript it precedes the order of default, which was entered October 20, 1898.

In *Schuh v. D'Oench et al.*, 51 Ill. 85, a demurrer to the declaration was filed and a default entered the same day, and the error assigned was the same as is assigned in this

case. The only difference between that case and this seems to be that in that case there was a demurrer in the record, while in this there is none. The court say :

“The only error assigned on this record is that the court below rendered judgment by default when defendant’s demurrer to the declaration had not been determined. The demurrer was filed on the 7th of April, and the default was entered on the same day. But there is nothing in the record from which it can be determined which was the prior act. Had the clerk kept a minute book in which he had noted each step taken in the progress of the business of the court, in the order in which it occurred, there would have been no difficulty in knowing which was the precedent act. But in the absence of such an entry we are left to conjecture alone, and it would not be proper for us to presume merely from the fact that both acts were of the same date that the filing of the demurrer was prior in point of time. We must presume that the court below acted correctly, until error is shown to have been committed. And this record fails to show that any exists.”

In making up a transcript it is usual and proper for the clerk to enter in the transcript, immediately before the copy of a pleading, the date when it was filed, which date he necessarily gets from the filing mark on the document. In the present case, there being no demurrers in the record, we can not understand from the record from what source he could have ascertained that “two certain demurrers were filed.” Pleadings are not required to be recorded (1 S. & C.’s Stat., Chap 25, Sec. 14); the clerk was only authorized to make the entry in case the demurrers were on file and copied into the transcript, and if the demurrers were not on file, the entry would seem to have been unauthorized.

It must be presumed that all the pleadings in the cause were before the court when the order of default was made. The order expressly adjudicates that plaintiffs in error had failed to plead to the declaration. Such is the record, and it can not be contradicted by affidavits. *Lyon v. Barney*, *supra*; *Mains v. Cosner*, 67 Ill. 536, 539.

In *Crawford v. Williams*, 1 Swan. (Tenn.) 241, 346, which was error *coram nobis*, the court say :

“It is true that nothing can be assigned for error in fact

which appeared and was adjudged in the former suit, or which contradicts the record of that suit. Bac. Ab., title, Error. And in *Birch v. Trist* it is said that the error in fact must be of such a nature as, if true, will destroy the plaintiff's right of action. 8 East, 415."

Only errors of fact can be assigned in support of a writ of error *coram nobis*. *Crawford v. Williams*, *supra*; 2 Tidd's Practice, 1136-7; *Maple v. Havenhill*, 37 Ill. App. 311, 314; *Est. of Jno. C. Gould v. Watson*, 80 Ib. 292.

If, as contended by counsel, demurrers were filed, then, in legal contemplation, they were before the court when the order defaulting plaintiffs in error was entered, and the error of entering that order without first passing on the demurrers, was an error of law which can not be questioned on error *coram nobis*. The reason that on error *coram nobis*, an error of the court in deciding a question of law or adjudicating a question of fact, can not be taken advantage of, is, that a trial court can not, after the term has passed, review its decisions. The remedy in such case is by writ of error from or appeal to a higher tribunal.

We have not considered the affidavits, for reasons heretofore stated, and the affidavit sworn to December 21, 1898, could not be considered in any event, because the order overruling the motion of plaintiffs in error was entered December 17, 1898, four days before the affidavit was sworn to, and it could not have been used as an affidavit on the hearing, and therefore the matter contained in it could not have been considered by the trial court on the hearing of the motion.

The order overruling the motion of plaintiffs in error will be affirmed.

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**Matthew W. Pinkerton and Israel W. Bollinger v. William Sydnor.**

1. PRACTICE—*Going to Trial Without Issue Joined*.—Where the parties to a civil suit go to trial without an issue of fact joined, the irregularity is cured by the verdict.

2. TRIALS—*Unnecessary Comments by the Trial Judge*.—It is a sal-

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utary rule that the trial judge should, during a trial, refrain from any unnecessary comments which might tend to a result in this regard prejudicial to any litigant, but when it becomes unavoidable in the procedure of a trial to impose a fine upon any person connected therewith, it can not be held that this should of itself cause a mistrial, merely because the occurrence might have some influence upon the minds of the jury.

8. DAMAGES—\$1,271 *Not Excessive*.—Where a person is arrested without legal cause and unlawfully detained in custody for three days and nights in a detective agency, a verdict for \$1,271 is not excessive.

Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 5, 1900.

**Statement.**—This suit was brought by defendant in error to recover damages for an alleged unwarranted arrest and false imprisonment of defendant in error by plaintiffs in error and others sued jointly.

The evidence discloses that defendant in error was employed as a night watchman at a warehouse of which plaintiff in error Bollinger was manager. Sums of money had been stolen from the safe of the warehouse. Bollinger employed private detectives to watch the premises in order to discover the thief. Brown and Perry, the two detectives who undertook this work, were hidden in the warehouse on the night of November 24, 1894. Sydnor, the defendant in error, while upon duty as watchman on that night, found the door of the safe unlocked. He examined it, left it unlocked, and went to other parts of the building upon his rounds as watchman. When he returned the two detectives arrested him, put handcuffs upon him and took him to a room in the same building, where he met Bollinger. Bollinger accused him of the thefts. Sydnor denied any guilt. He was then taken handcuffed to the detective office of Matthew W. Pinkerton, one of plaintiffs in error. That night he was chained to a bed. While in the office of Matthew W. Pinkerton, the latter interviewed him and advised him to confess, and suggested that if he would tell about the money that Bollinger would give him back his position. Sydnor protested his innocence. He was detained a prisoner at this office from Tuesday night, when he was

arrested, until Saturday morning, when he was discharged. During this period he was taken out by a detective to get his meals. It would seem that after the first night of his imprisonment he was not chained to his bed.

The suit was discontinued as to certain defendants. The other defendants demurred to the declaration, which consisted of three counts. This demurrer was sustained as to the third count only. Defendant Bollinger, plaintiff in error here, then pleaded the general issue as to the first and second counts of the declaration. No plea was ever filed by Pinkerton, nor was there any rule upon him to plead, nor was any order of default entered.

The cause was reached for trial and the plaintiff, defendant in error here, appeared. Mr. Brace appeared as counsel for Bollinger. At the commencement of the trial no one appeared for Pinkerton. Neither Bollinger nor Pinkerton were present in person. After a jury had been impaneled and the defendant in error had been called as a witness and had testified upon his direct examination, Mr. Beattie, counsel for Pinkerton, came into the court room. Defendant in error was cross-examined at length by counsel for Bollinger and by counsel for Pinkerton. After the testimony of defendant in error was given, one witness was examined as to a question of identity. The counsel for all the parties made their arguments to the jury. At the close of these arguments, Bollinger entered the court room. Counsel for Bollinger requested the court to permit his client to be examined as a witness in his own behalf. This was denied by the court. Counsel for Pinkerton objected to the language of the court in ruling upon the request, and the court imposed a fine upon the counsel thus objecting, holding, evidently, that the language in which the objection was couched was a contempt of the court. The colloquy between court and counsel was as follows. Counsel for Bollinger in urging his request that the latter be permitted to testify, said among other things:

"We submit it would serve the purposes of justice, although he came into the court room a few minutes late, to examine him."

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Thereupon the court said :

"It is not a few minutes late. The case is all closed. Now, if I open the case again, I have got to open the case, not only to hear this testimony, but testimony on the other side and all the arguments over again. I don't know but what he was right out in the hall there."

Thereupon Mr. Brace said:

"We will show by him what caused his delay, and that he got here as soon as he possibly could; as soon as it was physically possible."

Thereupon the court said :

"I never could do business here, and no court could, if parties could go away or stay away whenever the case was called, and then come in after finding out what the testimony was and what the arguments were."

Thereupon Mr. Beattie said :

"I don't think the remarks of your honor are fair, and I desire to except to that remark of your honor in the presence of the jury."

Thereupon the court said :

"Mr. Clerk, fine Mr. Beattie twenty-five dollars for contempt of court, and let him stand committed until the fine is paid. Mr. Bailiff, see that the fine is paid."

Thereupon Mr. Beattie said :

"Please allow an exception to that order to go into the record."

All of which matters, following the arguments of counsel, took place in the presence and hearing of the jury. Thereafter the court gave to the jury the following instruction :

"If the jury find from the evidence that the defendant caused the arrest of the plaintiff as charged in the declaration, then they will find the defendants guilty and assess the plaintiff's damages at such sum as they may find from the evidence he should receive, not to exceed the sum of \$5,000."

The jury found the plaintiffs in error guilty and assessed the damages at \$1,271.

Upon motion for a new trial an affidavit by plaintiff in error Bollinger was presented, by which it was alleged,

among other things, that the affiant had first learned that the cause was about to be called for trial a few minutes before 10 A. M.; that he proceeded at once to the court room, arrived about 10:45 A. M., and found that the case had been "tried and disposed of," excepting arguments of counsel. It is also alleged in this affidavit that when affiant Bollinger met the defendant in error in custody of the two private detectives the evening of the arrest, the detectives informed affiant, in presence of defendant in error, that they had seen the latter open the doors of the safe; that he had keys in his hand; that he opened affiant's office desk, but that the detectives were unable to see whether he took anything from safe or desk. It is also alleged in the affidavit that after his arrest, defendant in error was about to be taken to a police station, when he begged to be taken to the detective agency rather than to the station. That he was then taken to the detective office and allowed to remain there at his own request, and as an alternative to going to a police station. The affiant alleged also that he talked with plaintiff in error upon the following day, and that he then "expressed himself as having been well treated and being satisfied with his treatment, except that he desired haste to be made in investigating his case."

A motion for a new trial and a motion in arrest of judgment were overruled, and judgment was rendered upon the verdict, from which judgment this appeal is prosecuted.

C. STUART BEATTIE, for plaintiffs in error.

EDWARD H. MORRIS, attorney for defendant in error.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

It is assigned as error that the trial court erred in overruling the motion in arrest of judgment, because it appears from the record that when the cause was put upon trial no pleas had been filed by plaintiff in error Pinkerton, no rule upon him to plead had been entered, and his default had not



been taken. It was undoubtedly irregular practice to proceed to a trial of an issue of fact when no such issue had been presented by the pleadings, so far as this one plaintiff in error is concerned, but the error can not now be availed of by plaintiff in error. He had not pleaded, but through his counsel he appeared at the trial and took part therein. There was no issue of fact as to his case formulated by the pleadings, but by his conduct he treated the cause as presenting the issue upon which the cause was submitted to the jury. After a trial of the merits, in which he participated, he can not now be heard to complain that there was no issue to be tried. If the trial had resulted in a verdict of not guilty, the defendant in error, plaintiff below, could not have been heard to object that there was no issue to be tried, after he had participated in the trial of the issue of guilty or not guilty; nor can plaintiff in error, under like circumstances, be heard to make such complaint after a verdict of guilty. The question was not raised in the court below until after verdict. The irregularity was cured by verdict. *Brazzle v. Usher*, 1 Ill. 35; *Ross v. Reddick*, 2 Ill. 73; *Graham v. Dixon*, 4 Ill. 115; *Armstrong v. Mack*, 17 Ill. 166; *Strohm v. Hayes*, 70 Ill. 41; *Gibbie v. Mooney*, 22 Ill. App. 369.

It is assigned as error, and urged here, that the trial court erred in using language in the presence and hearing of the jury which was calculated to prejudice the rights of plaintiffs in error, and that the action of the court in imposing a fine upon one of counsel was also calculated to cause such prejudice.

The propriety of the action of the court in imposing a fine upon counsel is not here involved; the only question here being as to whether the action of the court, in the presence and hearing of the jury, and the language of the court, were so far likely to prejudice the right of plaintiff in error to a fair trial as to be ground of reversal. We are aware that juries are sensitive bodies, and that slight things are likely to influence them in their disposition toward litigants. It is, therefore, a salutary rule that the trial judge

should, during the trial, refrain from any unnecessary comments which might tend to a result in this regard prejudicial to any litigant. But when it becomes unavoidable in the procedure of a trial to impose a fine upon any person connected therewith, it can not be held that this should of itself cause a mistrial merely because the occurrence might have some influence upon the minds of the jury. The propriety of the fine itself not being here involved we can not say that the language of the court in making the order was of itself sufficient to constitute reversible error. Nor do we think that the comments of the court, in denying the request to permit Bollinger to testify, were so far prejudicial to plaintiff in error as to warrant a reversal. The probable effect of any such comments must be measured largely by the facts of the case presented. The facts of this case are such that we feel it safe to assume that the result of the trial could have been no different had the language objected to not been used.

It is urged that the instruction given to the jury is erroneous. We are of opinion that this contention can not be maintained. Pinkerton is shown, by the evidence, to have been not only in the position of one who ratified the acts done by the two detectives, Brown and Perry, but, as well, to have been a principal in the causing of the continuance of the unlawful imprisonment from Wednesday until Saturday. He knew that Sydnor was improperly imprisoned within his office on Wednesday, at which time he talked with him and endeavored to get a confession of guilt from him. Upon failure to obtain such confession, Pinkerton permitted the unlawful imprisonment to continue in his premises, and presumably, by his authority, until Saturday morning. The facts here to charge him as a principal are much like the facts disclosed by the decision in *Pinkerton v. Martin*, 82 Ill. App. 589, wherein the court, speaking through Mr. Justice Crabtree, said:

"We are satisfied, from the evidence, that he is responsible for the conduct of his employes in the treatment of appellee from the time he was arrested until his final discharge from their custody. One ordering an illegal arrest

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and confinement in his own office, by his own employes, ought not to be permitted to escape responsibility, if outrage is committed, on the ground that he did not specifically order it."

It is true that in the case here there is no positive evidence that the men, Brown and Perry, who made the arrest, were employes of Pinkerton. But from the facts that defendant in error was taken to the office of Pinkerton and that he was there interviewed by the latter, and that his imprisonment was thereafter continued in the office of Pinkerton, the jury might fairly infer that the treatment of the defendant in error, at least after he was brought to the office, was by authority of Pinkerton. No showing to the contrary was made, either at the trial or upon the motion for a new trial. The instruction, therefore, was not erroneous, as being applicable only to a condition of facts not warranted by the evidence. No other objection to the instruction is argued.

We are of opinion that the evidence is sufficient to support the verdict, both as to liability and as to the amount of damages awarded.

There is no evidence showing a pecuniary loss of the amount awarded; but the case is one which warrants the granting of damages for injury to the defendant in error beyond the mere matter of money loss, and, as well, the inflicting of damages as smart money.

It is conceded that the arrest and the imprisonment which followed were without warrant of law. It is not contended that defendant in error was guilty of the charge which was made against him. In the affidavit of Bollinger it is stated :

"After plaintiff had been in custody for some three days, it was learned that nothing was taken from the safe on the night that said operatives arrested plaintiff, and as it was not possible to identify plaintiff with the previous losses of money from said safe, he was released from custody by the operatives of said detective agency."

In consideration of the gravity of the wrong done to defendant in error, we are of opinion that the verdict was moderate in amount.

The only remaining question is as to whether the court erred in not granting a new trial because of the showing made by the affidavit of Bollinger.

The only attempt to disclose to the court any ground of defense to the action is by this affidavit. Taking all that it contains as true, and assuming that it should be considered, although no motion for a continuance was made upon the ground of Bollinger's absence, yet the contents of the affidavit make no showing which would question the liability of the plaintiffs in error or the right of defendant in error to the recovery. The judgment is affirmed.

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**Otto Reiss v. Jacob N. Scherner et al.**

1. **BUILDING CONTRACTS—*What is Not a Deviation.***—A subsequent agreement between the parties to a building contract to substitute "cherry for oak in the front parlor," is not a deviation from a building contract containing a provision that the owner may make alterations by adding, omitting or deviating from the stated plans, drawings and specifications, or either of them, which he shall deem proper and the architect shall advise, without impairing the validity of such contract.

2. **SAME—*What is Not a Modification.***—A subsequent agreement between the parties to a building contract to erect a barn on the same premises can not be said to be a modification of a prior contract to erect a residence.

3. **PAYMENTS—*Appropriation of, etc.***—It is not necessary that the appropriation of the payment should be made by an express declaration of the debtor; if his intention can be clearly gathered from the circumstances of the case, the creditor is bound by it.

4. **SAME—*What Amounts to an Appropriation by the Debtor.***—If the debtor, at the time of making a payment, makes an entry in his book, stating such payment to be on a particular account, and shows the entry to the creditor, this is a sufficient appropriation by the debtor.

5. **SAME—*Right of Appropriation Exercised by Entries in Books.***—The right of election of appropriation of a payment is not conclusively exercised by entries in the books of either party until those entries are communicated to the other party.

**Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.** Heard in this court at the March term, 1899. Affirmed in part and reversed in part, with directions. Opinion February 5, 1900.

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Reiss v. Scherner.

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IVES, MASON & WYMAN, attorneys for plaintiff in error.

DUNN & BYRON, attorneys for defendants in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

Jacob N. Scherner and others, defendants in error, filed a petition for mechanics' liens on certain premises described in the petition, against Joseph P. Holzbauer, the owner of said premises, Otto Reiss, plaintiff in error, Julius Schilling and others. The issues having been made up, the cause was referred to the master to take proofs and report. The master in his report recommended, among other things, that a trust deed of the premises held by plaintiff in error, and by virtue of which he claimed a lien, should be released, as a cloud on the title. The court overruled Reiss' exceptions to the master's report, confirmed the report and dismissed Reiss' cross-bill praying relief in respect to his trust deed.

The facts are substantially as follows: May 17, 1897, Jacob N. Scherner and Joseph P. Holzbauer contracted for the erection by the former of a building on the premises described in the petition, the building to be completed on or before August 15, 1897, for the consideration of \$4,000, payment to be made by Scherner to Holzbauer, as follows: \$1,500 when the roof should be on; \$1,000 when the building would be plastered; \$500 when it would be ready for painting, and \$1,000 when it would be completed, delivered and accepted. The contract was, at the time it was made, formally reduced to writing, ready for the signatures of the parties, but was not then signed, it appearing from the evidence that the parties did not intend to sign it, but intended it merely as a memorandum of their agreement. After the agreement was reduced to writing, and about May 19, 1897, it was further agreed between Scherner and Holzbauer that the former should build a barn on the premises for the sum of \$150, and that he should substitute cherry for oak in the front parlor of the building for the sum of \$25. This latter agreement was not reduced to writing. At the time of the

agreements mentioned there was a mortgage on Holzbauer's premises to secure payment of the sum of \$500, and he, intending to borrow money to make the improvements contracted for with Scherner, desired to remove the mortgage incumbrance, and for this purpose he borrowed from Scherner \$500, and with that sum paid the money secured by the mortgage. Holzbauer then, through John C. Krassa, applied to Theodore Schintz for a loan on the property, and Schintz agreed to lend him \$3,000, but required that Holzbauer and Scherner should sign the writing of May 17th, embodying the terms of the contract between them, which they did. This was about two weeks after the making of that contract.

May 24, 1897, Joseph Holzbauer executed and delivered to Schintz two principal notes, each payable to his own order and by him indorsed; one note being for the sum of \$500, due three years after date, with interest at the rate of seven per cent per annum, payable semi-annually; the other for the sum of \$2,500, payable and indorsed in like manner, due five years after date, with interest at the rate of six per cent per annum, payable semi-annually. At the same date Holzbauer executed and indorsed notes for the semi-annual interest to become due on each of the principal notes. Also, at the same date Holzbauer and his wife, Emma, executed to Theodore Schintz a trust deed of the premises described in the petition, to secure the payment of the \$500 note, which was recorded June 23, 1897, and also executed to Schintz a trust deed of the same premises to secure the payment of the \$2,500 note, which was recorded May 29, 1897. June 2, 1897, Julius Schilling purchased from Schintz the \$500 note, paying therefor \$500. In the latter part of May, 1897, Otto Reiss purchased from Schintz the \$2,500 note, paying therefor \$2,500. July 16, 1897, Schintz gave his check to Holzbauer, payable to the latter's order, for the sum of \$500, which check Holzbauer indorsed and delivered to Scherner about July 17, 1897, in payment of the \$500 theretofore lent to him by Scherner to remove the incumbrance on the premises prior to the trust deeds in question. The Schintz check was paid and the \$500 mentioned in it

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was all the money which Holzbauer ever received from Schintz on account of his notes and trust deeds. Each of the principal notes had a power of attorney annexed to it, which authorized the holder to declare the note and interest thereon due, and confess judgment for the same in the event of non-payment of interest when due. The first interest note for the semi-annual interest due on the \$2,500 note not being paid, Otto Reiss elected to declare the principal note for \$2,500 due and payable, and, November 27, 1897, caused judgment to be entered by confession for \$2,625, the amount of said note and interest thereon. Subsequently the court granted leave to Holzbauer to plead to the declaration, the judgment to stand as security.

Scherner commenced work under his contract with Holzbauer May 17, 1897, and fully completed the same by July 24, 1897, and the same was accepted by Holzbauer. The value of the lot on which the house and barn were erected is \$1,000, and the value of the improvements placed thereon by Scherner \$4,500. The court, by its decree, found that the amounts due Scherner, and others claiming mechanics' liens, were first liens on the value of the buildings, exclusive of the value of the lot, and that Schilling had a prior lien on the lot, exclusive of the value of the buildings. The decree concludes as follows:

"The court orders that unless the various sums above found due, and costs of suit, including \$340 allowed for master's fee, are paid within three days, said premises be sold; that out of the proceeds of sale the master retain his fees, etc., and pay the aforesaid parties or their solicitors their costs, and then pay said Scherner, Susmilch Bros., Sirovy, McConnell and Dawson Bros. and Julius Schilling, or their solicitors, the amount found due each of them respectively, with lawful interest, etc.; that in case the sum realized is not sufficient to pay said sums, the master, after paying costs and disbursements, shall pay Julius Schilling two-elevenths of said proceeds, and to said Scherner, Sirovy, Susmilch Bros., McConnell and Dawson Bros., nine-elevenths, until the lien of said Schilling is satisfied, and thereafter pay the whole of said proceeds to complainants and Dawson Bros. *pro rata*."

Counsel for plaintiff in error contend that there is a variance between the petition and the evidence, in that the petition alleges that the contract between Scherner and Holzbauer was verbal, whereas the evidence is that it was in writing, also that the parties attempted to vary the written contract by oral agreement.

We find no variance between the petition and the evidence. The petition alleges the facts as they are proved to have occurred. Neither do we find any verbal modification of the written contract, even though it be considered as signed by the parties May 17, 1897, when it was reduced to writing. The subsequent verbal agreement between the parties was that Scherner would erect a barn on the premises for the consideration of \$150, and would also substitute cherry for oak in the front parlor of the house for the consideration of \$25 in addition to the contract price. By the written contract it was not agreed that Scherner would erect a barn, and it certainly can not be said that a contract to erect a barn is a modification of a prior contract to erect a residence. Neither was the agreement to substitute cherry for oak in the front parlor a deviation from the written contract inconsistent with its terms. The written contract contains the following :

"It is also further agreed that the said party of the second part may make all alterations by adding, omitting, or deviating from the aforesaid plans, drawings and specifications, or either of them, which he shall deem proper and the said architect shall advise, without impairing the validity of this contract," etc.

The change from oak to cherry was one of minor importance, and within the meaning of the written contract, and was not a change of the contract in the sense contended for by counsel. *County of Cook v. Harms*, 108 Ill. 151, 159.

The petition contains the following averments :

"That on May 19, 1897, said agreement was verbally modified, in this respect, namely, that it was agreed that Holzbauer might, at his discretion, let independent contracts for the cut stone and mason work, and should receive a credit upon the sum originally agreed upon, as the



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contract price between said Scherner and Holzbauer, for such sum as said Holzbauer should agree to pay to the other contractors, for furnishing and setting cut stone and doing the mason work, but in all other respects said contract should be executed as originally agreed on; and that Scherner should receive for completing building the difference stipulated in the original contract (in addition to sums hereinafter specified, agreed to be paid for extras), and the sum or sums of said cut stone and mason contracts, if let to other contractors."

The evidence is that Holzbauer did let sub-contracts for the cut stone and mason work, and in the accounts between him and Scherner, as stated by the master, Holzbauer is credited with the amounts of such contracts. Scherner clearly had the right, under his contract with Holzbauer, to make sub-contracts for the cut stone and mason work necessary for the performance of his contract with Holzbauer, and having such right, he could lawfully authorize Holzbauer to make the sub-contracts, agreeing to credit him with them, and it was not necessary that such agreement should be in writing. The substance of the matter is, that Scherner, instead of making the sub-contracts in person, made them through Holzbauer. The making these sub-contracts for labor and material required to be performed and furnished by the original contract, was not a variation from, or modification of that contract, as claimed by plaintiff in error. Plaintiff in error claims that he is entitled to a lien by virtue of his judgment against Holzbauer of November 27, 1897. The court in its decree has found that the legal title is now in Emma Holzbauer. We find no evidence in the record to sustain this finding. Petitioner offered in evidence a deed from Holzbauer and Emma, his wife, purporting to convey the premises to Adolph Lonek, and also a quit claim deed of the premises from Lonek to Emma Holzbauer, but both these deeds, by agreement between the parties, were excluded from the evidence, and the petition avers, the answer of Reiss admits, and the master and the court both find, that May 17, 1897, Joseph P. Holzbauer was the owner of the premises; which being true, and there being no evidence of the alienation of his title, the presumption is that

he was such owner November 27, 1897, when plaintiff in error recovered judgment against him, and therefore that the judgment became a lien on the premises, subject to the mechanics' liens and the lien of the trust deeds.

Plaintiff in error claims, finally, that the negotiation of the loan from Schintz and the execution to him of the notes and trust deeds having all occurred at the same time, must be regarded as parts of the same transaction, and that Schintz having advanced the \$500 to Holzbauer generally, as if only one note had been executed, and not having applied it to either note, it must be regarded as paid on both notes, and that he, as the owner of the \$2,500 note, and Schilling as the owner of the \$500 note, are entitled to liens to the extent of \$500 and interest, the lien of each to be in the proportion which the amount due him bears to the total indebtedness of \$3,000; in other words, that plaintiff in error is entitled to a lien for five-sixths of the \$500 and Julius Schilling to a lien for one-sixth thereof. We are of opinion that this contention must be sustained. Holzbauer testified that he got a check for \$500 from Schintz on account of the \$3,000 loan, but also testified that when he received the \$500 from Schintz he thought he would apply it on the \$500 note, but says that this was merely what he thought, what he intended, but that he said nothing to Schintz or any one about his intention, and it does not appear from the record that he ever did or said anything indicating an intention so to apply it, until he testified before the master. Counsel for defendant in error Schilling, now contend that Holzbauer's unexpressed, unindicated thought or intention was an appropriation binding on plaintiff in error. We think it clear that it was not. Parsons, in his work on Contracts, says:

"It is not necessary that the appropriation of the payment should be made by an express declaration of the debtor; for if his intention and purpose can be clearly gathered from the circumstances of the case, the creditor is bound by it. If the debtor, at the time of making a payment, makes also an entry in his own book, stating the payment to be on a particular account, and *shows the entry to the*

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*creditor*, this is a sufficient appropriation by the debtor. But the right of election of appropriation is not conclusively exercised by entries in the books of either party until those entries are communicated to the other party." 2 Parsons on Cont. (6th Ed.), Sec. 630.

In 2 Am. & Eng. Ency. of Law (2d Ed.), 448, the rule is thus stated :

"The communication need not be expressed in writing, nor in any technical or formal words, nor delivered in any particular manner. It will be sufficient if the intention is manifest, and that it comes to the knowledge of the other party."

In *Harker v. Conrad*, 12 S. & R. (Pa.), 301, 305, the court say :

"Although as between the immediate parties the creditor has a right to appropriate when the debtor has failed to do so, yet this right must be exercised within, at the furthest, a reasonable time after the payment, and by the performance of some act which indicates an intention to appropriate. It is too late to attempt it at the trial," etc.

In *United States v. Kirkpatrick*, 9 Wheaton, 721, 737, Mr. Justice Story, delivering the opinion, says :

"It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen, and *a fortiori* at the time of the trial."

There having been no appropriation by either Holzbauer or Schintz, the \$500 must be appropriated in accordance with equitable principles, and plaintiff in error and Schilling being both innocent purchasers for value, and the debt being single, namely, for \$3,000, although evidenced by two notes, we are of opinion that they are entitled to liens, as heretofore stated. The note for \$2,500 held by Reiss was introduced in evidence before the master, and reads as follows: "Five years after date, if for value received, I promise to pay to the order of myself," etc. The question was contested before the master whether the word "if," between the words "date" and "for," was written before or after the note was signed. The master and the court both found that it was unnecessary to decide that question, presumably on the ground that the payment of \$500 by

Schintz to Holzbauer was, at least, in part consideration of the note. However this may be, we are of opinion that the preponderance of the evidence is against the theory that the word "if" referred to, was in the note when it was signed.

The decree, in so far as it dismisses the answer in the nature of a cross-bill of Otto Reiss, plaintiff in error, and also in so far as it decrees that the trust deed executed by Holzbauer and wife to Schintz, of date May 24, 1897, to secure payment of the \$2,500 note held by said Reiss, be set aside as a cloud on the title, is reversed, and the court is directed to decree that Otto Reiss has a prior lien on the premises, exclusive of the buildings thereon, for five-sixths of the sum of \$500 and interest from May 24, 1897, and that Julius Schilling has a lien on said premises, exclusive of the buildings thereon, for one-sixth of \$500, with interest from May 24, 1897, and to decree distribution of the proceeds of the sale of the premises accordingly, and if there shall be any surplus of the proceeds of the sale of the premises, after payment of the claims of Julius Schilling, Otto Reiss, and the other claimants named in the decree, the court is directed to order such surplus to be paid into court subject to the further order of the court, when the issue between Otto Reiss and Joseph P. Holzbauer on the common law side of the court, in respect to the judgment recovered by said Reiss against said Holzbauer, shall be finally determined. In other respects the decree is affirmed; plaintiff in error to recover his costs of this court. Affirmed in part and reversed in part, with directions.

## CASES

IN THE

# APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—OCTOBER TERM, 1899.

### Commissioners of Union Drainage District v. The Commissioners of Highways.

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1. **APPEALS—By Drainage Commissioners Without Bond.**—Under Section 71 of the Practice Act (Hurd's R. S. 1899, 1214), no appeal bond is required of the commissioners of drainage in taking an appeal from an inferior to a higher court.

2. **BRIDGES—Recovery of Costs of Building by the Drainage Commissioners.**—An action will not lie by the commissioners of a union drainage district against the highway commissioners of two towns jointly for the cost of a bridge erected by such drainage commissioners over a ditch dug by them across the highway on a town and county line between said two towns, where said highway commissioners have not made a joint contract to build said bridge.

3. **SAME—Expenses of Building where the Towns are Liable.**—Where the commissioners of a union drainage district dig a ditch across a town line road, and after notice to the highway commissioners of both towns to build a bridge in the highway across said ditch, and failure of said highway commissioners to build such bridge, the said drainage commissioners build the bridge, the highway commissioners of said two towns are liable for the expense of building said bridge in such proportion as is just and equitable, taking into consideration the taxable property in each town, the location of the bridge, and the advantage each will derive therefrom.

4. **SAME—When Not Included in an Allotment.**—An allotment of a town line road does not include bridges upon said road.

5. **APPELLATE COURT PRACTICE—A Plaintiff Entitled to a Reversal of a Judgment in his Favor.**—A plaintiff is entitled to the reversal of an erroneous judgment in his favor.

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Appeal from the Circuit Court of DeKalb County; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded with directions. Opinion filed February 1, 1900.

D. J. CARNES, G. W. DUNTON and JOHN FAISSLER, attorneys for appellant.

The statute in relation to allotment of roads on town and county lines, in force on June 9, 1870, when the road in question was divided, was the act of 1861, section 86, page 262, and read as follows:

"It shall be the duty of the said commissioners, when there may be such highway, to divide it into two or more road districts in such manner that the labor and expense of opening, working and keeping in repair such highway, through each of the said districts, may be equal, as near as may be, and to allot an equal number of the said districts to each of the said towns."

Section 87 provided:

"Each district shall be considered as wholly belonging to the town to which it shall be allotted for the purpose of opening and improving the road and keeping it in repair."

The present act, Par. 58, Starr & Curtis' Statutes, Chapter 121, reads:

"The commissioners shall also, in case a new road is established, allot to each of such towns the part of such road which each of such towns shall open and keep in repair, and the part so allotted shall be considered as wholly belonging to such town."

Par. 21 of the road and bridge law (Starr & Curtis) provides for bridges over town or county boundary streams, and is as follows:

"Bridges over streams which divide towns or counties, and bridges over streams on roads on county or town lines, shall be built and repaired at the expense of such town or counties: Provided, that for the building and maintaining of bridges over streams near county or town lines, in which both are interested, the expense of building and maintaining any such bridges shall be borne by both counties or towns in such portion (proportion) as shall be just and equitable between said towns or counties, taking into consideration the taxable property in each, the location of the

bridge, and the advantage of each, to be determined by the commissioners in making contracts for the same as provided for in section 22 of this act."

The statute in relation to allotment of portions of the town line road to the respective towns does not include bridges. *Commissioners of Highways v. Gibson*, 7 Ill. App. 231.

The various statutes involved are there considered in an opinion by McCulloch, P. J., and he says, on page 234 :

"These sections relate wholly to the locating, opening, making and repairing of roads only, and have no specific application to bridges; \* \* \* although for the purpose of making and repairing roads laid out upon town lines, it is the duty of the commissioners to allot certain portions thereof to each town, yet they are under no obligation to do so in regard to bridges in which two towns are interested, but these are left to be provided for in some other manner."

The question was again before the Appellate Court in *People v. Commissioners of Highways*, 32 Ill. App. 164, and Judge Pleasants, in the opinion, on page 169, said :

"It is claimed that a bridge on the line of a road is a part of the road. \* \* \* We do not concede this. \* \* \* The statute uses both (road and bridge) as though neither included the other, and treats the two subjects separately, and in section 20 expressly recognizes a bridge as a distinct work on the road."

No action will lie by one town against another to recover one-half the expense of a bridge on a town line, because, under the statute providing for the building of such a bridge, the commissioners must agree in relation to the building of the bridge, and neither town was obliged to agree to build a bridge. The allotment of the road does not carry with it the burden of building the bridges on the parts so allotted. *Commissioners of Highways v. Commissioners of Highways*, 100 Ill. 631.

In *People v. Commissioners of Highways*, 158 Ill. 197, it appears that the road in question had been allotted into districts and apportioned between two towns, and that there had been afterward an agreement between the commissioners of the respective towns under the bridge statute as

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to jointly building a bridge, and that agreement was enforced by mandamus.

"In order to charge a party with a breach of duty in maintaining a bridge in repair, the word bridge should be used; it will not do to use the word highway." Elliott on Roads and Streets, 24.

Substantially the same is said in Angell on Highways, Sec. 40.

HOPKINS, THATCHER & DOLPH and JONES & ROGERS, attorneys for appellees.

If the drainage district in question (comprising less than three-eighths of the territory of the two towns) can build the bridge and compel the whole towns to pay, it would indirectly levy a tax beyond its jurisdiction against the consent of the inhabitants.

Taxation must be uniform within the jurisdiction of the body imposing the same. Constitution of Illinois, Sec. 9, Art. 9.

Burden of taxation can not be imposed without the consent of the taxpayers to be affected. *Udike v. Wright*, 81 Ill. 49; *People v. Knopf*, 171 Ill. 191; *Hundley & Rees v. Commissioners*, 67 Ill. 559; *People v. Mayor*, 51 Ill. 17.

Highway commissioners could not be compelled, against their judgment and discretion, to build a bridge. *People v. Highway Commissioners*, 158 Ill. 197.

The statute of allotment of town line roads provides that the portion allotted to each town shall be considered as wholly belonging to such town. *Gross' Statutes 1868*, Ch. 103, Art. 17, Secs. 86, 87, 88.

Sec. 21 of Chap. 121, *Hurd's Revised Statutes*, provides for the joint building of bridges over "streams." Streams are not artificial waterways. *Am. & Eng. Ency. of Law*, Vol. 23, page 939.

Drains mean artificial waterways. 6 *Am. & Eng. Ency. of Law*, page 2.

MR. JUSTICE DIBELL delivered the opinion of the court.

Union Drainage District No. 3, of the town of Virgil, Kane county, and of the town of Cortland, DeKalb county,



embraces less than one-half the territory of the town of Virgil, and less than one-fourth of the territory of the town of Cortland. The commissioners of said drainage district dug a ditch across the highway on the town and county line between said towns, and determined that a bridge across said ditch on said highway was necessary, and served notice upon the commissioners of highways of said respective towns to build such bridge. The highway commissioners did not comply: More than thirty days after said notice the drainage commissioners built said bridge at a cost of \$426.05, and then brought this suit against the highway commissioners of both towns jointly to recover the cost of said bridge. Summons was duly served. The highway commissioners of the town of Virgil were defaulted. The highway commissioners of the town of Cortland filed three pleas. The first was the general issue, and the second *nul tiel corporation*; and upon these issues of fact were joined. The third plea set up, among other things, that said town line road had been apportioned in 1870 under the statute; that the portion of the road where said ditch was dug was allotted to the town of Virgil, and said allotment had ever since continued in force, and under and by virtue of the allotment the town of Virgil had since then constructed the bridges and kept them in repair upon the part so allotted to it. A demurrer to said third plea was overruled and plaintiff elected to abide by the demurrer. The cause was tried without a jury upon a stipulation as to the facts. The right of plaintiff to maintain this suit was questioned by the highway commissioners of the town of Cortland by a motion to dismiss the suit, and by propositions of law presented. The trial court held the suit could be maintained, but that by virtue of the allotment the town of Virgil alone was liable to build and pay for the bridge. Judgment was therefore rendered against the highway commissioners of the town of Virgil for \$426.05 and costs, and against the plaintiff for the costs made by the highway commissioners of the town of Cortland.

Plaintiff appealed. The prayer was for a general appeal.

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and so was the order. Plaintiff, however, was required to and did give an appeal bond, in which the appeal was recited to be from the judgment for their costs in favor of the highway commissioners of the town of Cortland. Our attention is not drawn to any special provision of the statute requiring drainage commissioners to give a bond upon an appeal prayed by them, and under section 71 of the practice act no appeal bond is required of such a body of public officers. We therefore consider the bond surplusage. The appeal is general, and brings the whole case and all the parties before us. The highway commissioners of the town of Cortland have assigned cross-errors, and the highway commissioners of the town of Virgil have not.

First, the place where the ditch of the Union Drainage District crosses the town line road in question is within that part of said road which, in June, 1870, was allotted to the town of Virgil. The statute then in force relative to town line roads and the duties of the highway commissioners of the respective towns, was as follows (Gross' Statutes, Edition of 1868, Township Organization, Article 17, p. 773):

"Section 86. It shall be the duty of the said commissioners (meaning the highway commissioners of the two towns referred to in the previous section), when there may be such highway (a town line road), to divide it into two or more road districts in such manner that the labor and expense of opening, working and keeping in repair such highway through each of the said districts may be equal, as near as may be, and to allot an equal number of the districts to each of the said towns. Section 87. Each district shall be considered as wholly belonging to the town in which it shall be allotted, for the purpose of opening and improving the road and keeping it in repair; and the commissioners shall cause such highway, and the petition and allotment thereof, to be recorded in the office of the town clerk, in each of their respective towns. Section 88. All highways heretofore laid out upon the line between any two towns, shall be divided, allotted, recorded and kept in repair in the manner above directed."

These sections contained no reference to the subject of bridges. While they provided for apportioning each town line road so that each part of it should be, as to the working

and repair of the road, in legal effect, exclusively within one town, yet sections 18 to 21, inclusive, of said article 17, made provision for erecting and maintaining bridges on the town line road at the equal expense of both towns, where the liability to build bridges existed. This demonstrates that the allotment under said sections 86, 87 and 88, of article 17, above quoted, did not cover the subject of bridges on town line roads, but such bridges were governed by sections 18 to 21 of the same article. (Commissioners of Highway v. Gibson, 7 Ill. App. 231; People v. Commissioners of Highways, 32 Ill. App. 164.) In Commissioners of Highways of Dimmick v. Commissioners of Highways of Waltham, 100 Ill. 631, the pleadings showed that the desired bridge was in that part of the town line road allotted to the town of Dimmick, whose highway commissioners were the plaintiff, yet it was not there suggested that because of that allotment Dimmick was bound to build the bridge, but the case was determined on other grounds.

It is argued that as Paragraph 16 of Section 1 of Chapter 131 of the Revised Statutes, adopted in 1874, relating to the construction of statutes, provides that the words highway, road or street, "may include any road laid out by authority of the United States, or of this State, or of any town or county of this State, and all bridges upon the same," it necessarily follows that an allotment of a town line road places wholly within each town the bridges upon the part of said road allotted to it. The first part of said section 1 enacts that said rules of construction shall not govern where "such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute," and the first paragraph thereunder establishes as the cardinal principle for construing general terms "that the true intent and meaning of the legislature may be fully carried out." As article 17 of the road and bridge act in force when this allotment was made not only required the allotment of all town line roads, but also provided for building bridges on town line roads at the equal expense of both towns, where a liability to build existed, it would be inconsistent with the manifest intent of the legislature and repug-

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nant to such other provisions to hold that an allotment of a town line road included the bridges. The road and bridge act of 1883 in force when this suit was brought, being chapter 121 of the Revised Statutes, contained similar provisions. Section 58 requires the allotment of town line roads, while sections 21 to 24 provide for building bridges on town line roads, and for dividing the expense of building and maintaining such bridges between the two towns in such proportion as shall be just and equitable, taking into consideration the taxable property in each town, the location of the bridge, and the advantage each town will derive therefrom. Sections 23 and 24 show the highway commissioners of each town determine for their town whether they will enter into an agreement to aid in building the bridge. If the commissioners of each town agree to build the bridge, the expense must be borne equitably, as above stated. If the commissioners of one town refuse to aid in building the bridge, the other town may build at its own sole expense, if its electors so decide at a special town meeting. All the provisions of the act of 1883 considered, it is clear it would be inconsistent with the manifest intent of the legislature, and repugnant to the context of the same statute, to hold that the allotment of a town line road carries with it the bridges thereon, and imposes the cost of their erection and maintenance upon the town to which that part of the road where they are located is allotted. Again, the word used in said paragraph 16 of section 1 of the act for the construction of statutes is "may" and not "shall." Many instances can be found in the statutes where the words "road" and "highway" are used in a sense which plainly could not include bridges.

Further, if the allotment bound each town to build bridges over streams then crossing the road within its allotted part, yet such an allotment could not be so extended as to bind such a town to build a bridge over an artificial ditch dug across its allotted part of the road many years later by another corporate body, under laws and policies brought into being long after. The object expressed in section 86, above quoted from the statute in force when this

allotment was made, was to make the expense as nearly as practicable equal between the two towns. Requiring one town to construct at its sole expense a bridge over an artificial ditch dug years after the allotment would destroy the equality of expense provided for by the allotment. Again, it has been the law of this State for many years that no town is legally liable to build or repair a bridge on a town line road, except some statute expressly compels it, or it has assumed the liability to do so by some contract, express or implied. (Comrs. of Highways v. Comrs. of Highways, 100 Ill. 631; People v. Comrs. of Highways, 158 Ill. 197.) This established rule ignores all questions of the allotment of the road. We are therefore of opinion that the allotment in 1870 neither established the liability of the town of Virgil to build the bridge in question, nor tended to relieve the town of Cortland from liability therefor. Hence the demurrer to the plea should have been sustained.

Second. A town may by contract bind itself to build and to keep in repair a bridge upon a town line road, whether upon its allotted portion of the road or not. It is stipulated that upon the part of the road allotted to each town in 1870 there were then two bridges, and that each town has ever since maintained and kept in repair the two bridges upon the part of the road allotted to it. These facts tend to show an agreement by each town to keep in repair said two bridges located within its allotted part of the road. That agreement, however, whether express or implied, can not be extended so as to bind either town to erect a bridge in 1895 across an artificial ditch newly dug across said road by another municipality. Neither town is liable to build a bridge across said ditch by virtue of any express or implied agreement appearing in this record.

Third. From the authorities hereinabove cited, and from the cases cited in said authorities, and from the provisions of our present road and bridge act and of prior statutes upon the subject, we think it clear that prior to the passage of the farm drainage act it had long been the settled policy and law of this State that the determination of the necessity and advisability of building bridges upon highways

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should be left to the discretion of the highway commissioners of the town. After they had once determined to build a bridge and had built it, or had accepted a bridge built by private enterprise, they could be compelled to keep it in repair. If the location was on a town line road, and they had agreed with the commissioners of the other town to build or aid in building a bridge, they could be compelled to perform their contract, and thereafter to keep or aid in keeping the bridge in repair. But until the highway commissioners had in some way bound themselves, it was purely a question within the exercise of their uncontrolled judgment and discretion whether they would put the town to the expense of a bridge over any particular stream, except so far as the building of a bridge might be forbidden for lack of revenue. The provisions of prior statutes, which had been construed as investing highway commissioners with this discretion, were carried, as above shown, into the road and bridge act of 1883 (which was in force when this suit was begun in 1896), and with but slight change in language and meaning. It is claimed by the drainage commissioners here that this discretion, so far as relates to bridges over drainage ditches which cross highways, was impliedly destroyed by the farm drainage act of 1885. Section 40 $\frac{1}{2}$  relates to drainage districts wholly within one town, and is as follows :

“ The commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, or by the railroad company, as the case may be; Provided, however, notice shall first be given to the road or railroad authorities to build or construct such bridge or culvert, and they shall have thirty days in which to build or construct the same; such bridges or culverts shall in all cases be constructed so as not to interfere with the free flow of water through the drains of the district. Should any railroad company refuse or neglect to build or construct any bridge or culvert as herein required, the commissioners constructing the same may recover the cost and expenses therefor in a suit against said company before any justice of the peace

or any court having jurisdiction, and reasonable attorney's fees may be recovered as part of the cost. The proper authorities of any public road or railroad shall have the right of appeal the same as provided for individual land owners."

This section is peculiar in many respects. It does not directly enact who shall determine when a bridge across a public highway is necessary for the protection of the work done by the drainage commissioners. We assume that that determination is intended to be confined to the drainage commissioners. It enacts that the cost of such a bridge shall be paid out of the road and bridge tax, and requires notice to the road authorities to build a bridge that will not interfere with the free flow of water through the drains of the district, and thirty days time is given the road authorities to build such a bridge. Where such a bridge is needed across a railroad, and its authorities do not build it within thirty days after notice, and the drainage district builds the bridge, the section provides for a suit against the railroad company, but it makes no provision for suit against the highway commissioners if they fail to act. Yet it gives them the right of appeal. Inasmuch as the highway commissioners are required to build the bridge upon notice from the drainage commissioners, and it is required the bridge shall be built out of the road and bridge tax, and by a later act the highway commissioners are no longer also the drainage commissioners, as the farm drainage act first provided, it seems to follow that the highway commissioners, as to such bridges, are now deprived of the discretion formerly vested in them. This statute seems to impose a hardship upon those owning property within the town outside the drainage district. Section 40 permits the drainage district to assess against a public road the benefits it will receive from the construction of the drainage ditch, and requires such assessment to be paid out of the road and bridge tax. This provision has been sustained in *Com'rs of Highways v. Drainage Com'rs*, 127 Ill. 581. Having thus obtained pay for all the benefits the drainage district confers upon the highway, the drainage commissioners, by section 40 $\frac{1}{2}$ , may

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further build a bridge across its artificial ditch in the highway at the expense of the road and bridge tax. The result is that the entire body of taxpayers of the town not only must pay for the benefits the highways receive from the drainage ditch, but must, in addition thereto, pay the cost of a bridge required solely for the benefit of the drainage district. This seems to cast an unequal burden upon the taxpayers who reside outside the district in a town where the drainage ditch covers and benefits but a small portion thereof. It will, however, be assumed, for the purpose of this decision, that the legislature had power to enact this statute.

Fourth. Section 48 gives commissioners of union drainage districts the same powers as drainage commissioners have in districts wholly within one town. This would give them power to build a bridge over a drainage ditch intersecting a town line road, to be paid for out of the road and bridge tax. But is the road and bridge tax of each town liable for the entire cost, and if so, are the two funds liable jointly? This is an action of debt against the highway commissioners of the two towns. It is a familiar rule that where two or more are sued in an action *ex contractu* there must be a judgment against all or none, unless some defendant has shown a defense arising after the creation of the original liability. In other words, the plaintiff in every action *ex contractu* must prove the original joint liability of every person made defendant, or he must fail as to all the defendants. To maintain this action plaintiff was bound to prove that the highway commissioners of the two towns were jointly liable for the entire cost of the bridge. From what does this liability arise? Plaintiff in its argument says it does not rely at all upon the road and bridge act. The farm drainage act nowhere creates such a joint liability against the two towns for the entire cost of the bridge. It nowhere determines whether the road and bridge tax of each town shall be liable for the entire cost of the bridge, or whether each shall be liable for half the cost, or whether the cost shall be apportioned in some other manner. We are of opinion this is governed by section 21 of the road



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and bridge act of 1883, in force when this bridge was built. The old statute on this subject, to which we referred in an earlier part of this opinion, required the expense of a town line bridge to be divided equally between the two towns where a liability to build existed. Section 21 of the present act provides that the expense of such bridge shall be borne by the two towns in such proportion as shall be just and equitable between the two towns, taking into consideration the taxable property in each, the location of the bridge and the advantage of each. We are of opinion the drainage commissioners can not enforce that just and equitable division in an action of debt, where there must be a recovery against both defendants for one sum *in solido*. The drainage commissioners are not aided by section 22 of the road and bridge act. It makes it lawful for the highway commissioners of the two towns to make a joint contract for building a town line bridge, and provides that upon such a contract they may be sued jointly; but sections 23 and 24 show they can not be compelled to agree to aid in building a town line bridge. Here they did not make a joint contract, and section 22 does not apply. The drainage commissioners must seek their remedy in some proceeding wherein the equitable division of said cost between the two towns can be made.

The judgment against plaintiff for the costs made by the highway commissioners of the town of Cortland was therefore proper. It was error to overrule plaintiff's demurrer to the plea setting up the allotment, and error to refuse plaintiff's proposition of law upon that subject, and these rulings are assigned for error by appellant. In our opinion plaintiff is not entitled to recover the cost of the bridge in this joint action against the commissioners of highways of both towns, and should not have recovered a judgment against the highway commissioners of the town of Virgil. But they were defaulted, preserved no exceptions, did not appeal and have not assigned cross-errors, and we are without authority to reverse the judgment merely for their benefit. A plaintiff, however, may appeal or pursue a writ of error to obtain a reversal of a judgment in his favor for

irregularities which have intervened in the trial court, in order that he may obtain a regular and valid judgment or commence another suit. If the judgment in his favor is based upon reversible error, he is not bound to wait till defendants choose to attack it, but may himself secure its reversal in order that he may proceed in a proper manner for the enforcement of his rights. (Teal v. Russell, 2 Scam. 319; Jones v. Wight, 4 Scam. 338; Davidson v. Bond, 12 Ill. 84; Thayer v. Finley, 36 Ill. 262.) As already indicated, if the towns of Virgil and Cortland are liable for the cost of this bridge, under section 40½ of the farm drainage act, they are not liable jointly for the whole cost, but each is liable only for its just and equitable proportion thereof, under section 21 of the road and bridge act. It is manifest that in any attempt plaintiff may hereafter make to enforce the liability of the highway commissioners of the town of Cortland to contribute thereto, the judgment rendered below must prove an embarrassment, if not a bar. As error against plaintiff intervened, and the judgment below was erroneous, we are of opinion it has a right to a reversal of that judgment upon its own appeal, in order that it may pursue some proper remedy, and as we hold the suit can not be maintained, it should be dismissed. The judgment is therefore reversed, and the cause remanded to the court below, with directions to dismiss the suit at plaintiff's costs. The costs of this court will be adjudged against appellant.

Reversed and remanded with directions.

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**Charles H. Porter, use of James W. Gordon, v. John J. Glenn.**

1. STATUTES—*Providing that No Assignment or Other Disposition by an Heir Shall Operate to Defeat a Garnishment, Construed.*—The act of July 1, 1897 (Laws 1897, 231), providing that no assignment, transfer or other disposition by an heir, legatee or devisee of his distributive share, legacy or devise in the hands of any administrator or executor, shall operate to defeat the garnishment of the same, unless

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the said assignment, transfer or other disposition is reduced to writing and filed in the office of the county clerk, out of which such letters testamentary or of administration were issued before the service of process of garnishment upon such administrator or executor, is to be construed as having no retroactive effect.

2. CONSTRUCTION OF STATUTES—*Not to be Given a Retrospective Action Except, etc.*—Statutes are not to be given a retrospective operation except where it is manifest that the legislature intended that they should have such operation; and it is not competent even for the legislature to give such operation to an act where it will affect existing or vested rights.

3. SAME—*To Operate in Futuro.*—A statute is to operate *in futuro* only, and is not to be construed to affect past transactions; and if it is left doubtful what was the real design as to its having a prospective or retrospective effect, the statute must be so construed as to have a prospective effect only.

Appeal from the Circuit Court of Warren County; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

BASSETT & BASSETT and KIDDER & KIDDER, attorneys for appellant.

GRIER & STEWART, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

On May 7, 1894, appellant, James W. Gordon, obtained a judgment in the Circuit Court of Warren County against Charles H. Porter for \$338.50 and costs. Execution was issued upon the judgment on August 11, 1894, and delivered to the sheriff of said county, who afterward duly returned the same "no property found."

On January 15, 1895, John Porter, the father of Charles H. Porter, died leaving surviving him a widow, since deceased, and seven children. He also left personal property to a considerable amount, which had been used in paying the debts of his estate, and real estate valued at some \$15,000, subject to a mortgage of \$1,000. He died testate, and his will, which was duly probated in the County Court of said county, provided that after the payment of debts and funeral expenses, the remainder of his estate should be held by the

executors, and the rents, issues and profits used for the support of his widow while she survived, with full power, with her consent and that of a majority of the children then living, to sell any or all of the real estate and invest one-third of the purchase price for the use and benefit of the widow during her life; that out of the proceeds of such sale, not set apart for the use of the widow, they should pay certain legacies to two of his daughters; that after the death of the widow the remaining real estate should be sold and the proceeds of the whole estate "equally divided" among his heirs at law, "as the law now distributes intestate estates." Thomas H. Rogers and John J. Glenn were named as executors and vested with title to all the property of which the testator might die seized, in trust for the uses and purposes set forth in the will. The executors so named duly qualified as such January 26, 1895, and were so acting at the time service of process and garnishment was had upon them in this case. February 5, 1895, Charles H. Porter, for the consideration of \$600, conveyed by deed to his sister, Ella Porter Hanna, now Ella Porter Gillispie, all his right, title and interest in and to all of his father's estate, with full power to her to receive, collect and receipt for the same, but the conveyance was not filed for record until July 26, 1897. On March 21, 1898, appellant caused a summons in garnishment to be issued on his judgment and served on said executors. The latter filed their answers to the interrogatories, setting up the will under which they were acting, and showing that the personal assets had been collected and the proceeds all paid out; that all the real estate still remained undisposed of; that the estate was unsettled and no order of final distribution had been made. Afterward Ella Porter Gillispie filed her interpleader, claiming the property sought to be garnisheed as her own, by virtue of the deed to her from Charles H. Porter. The case was tried upon a written stipulation, which stated the facts substantially as above set forth. Upon the trial the court held in favor of the interpleader, discharged the garnishees and rendered judgment against appellant for costs.

The first question which arises is, was there such fraud

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shown by the stipulation of facts as to warrant setting aside the deed from Charles H. Porter to the interpleader? It is insisted by appellant that Charles H. Porter was insolvent, and that the price paid him by the interpleader for his interest in the estate was so inadequate as to import fraud. The only proof tending to show the insolvency of Charles H. Porter is the fact that the judgment of appellant was unpaid and that execution for the same had, prior to the time the deed was made, been returned by the sheriff "no property found." At the time the conveyance was made there was a widow, entitled to her share of the personal property and dower, and presumably homestead in the real estate. There were debts to a large amount, the extent of which could not have then been known, and certain legacies to be paid, after which the property was to be divided among seven children. In the absence of direct evidence of fraud, we do not think there was, under the circumstances of the case, a sufficient inadequacy of consideration shown to import fraud. The deed was therefore a valid one and conveyed all the interest of Charles H. Porter in his father's estate to the interpleader.

It is, however, contended by appellant that the interpleader is not in a position to claim the property in question, as against appellant, for the reason that she had not filed her deed of conveyance in the office of the clerk of the County Court, as required by the law of 1897 in relation to garnishment of administrators and executors. That law, which went into effect July 1, 1897, provided that "no assignment, transfer or other disposition by an heir, legatee or devisee, of his distributive share, legacy or devise in the hands of any administrator or executor, shall operate to defeat the garnishment of the same, unless the said assignment, transfer or other disposition is reduced to writing and filed in the office of the clerk of the County Court, out of which such letters testamentary or of administration were issued before the service of process of garnishment upon such administrator or executor." Laws of 1897, p. 231.

In order to sustain this position it would be necessary to

hold that the law in question had a retroactive effect and controlled a conveyance made more than two years prior to the time the law went into effect.

In the case of *Dobbins v. First National Bank*, 112 Ill. 553, it is said :

"It is well settled by authority that statutes are not to be given a retrospective operation except where it is manifest that the legislature intended that they should have such operation; and, as already shown, it is not competent even for the legislature to give such operation to an act where it will affect existing or vested rights."

In *Means v. Harrison*, 114 Ill. 248, it was declared to be the general rule "that a statute is to operate *in futuro* only, and is not to be construed to affect past transactions, and that if it is left doubtful what was the real design as to its having a prospective or retroactive effect, the statute must be so construed as to have a prospective effect only."

This doctrine is recognized and indorsed in the case of *Rock Island National Bank v. Thompson*, 173 Ill. 593, where it is said :

"Retrospective laws are not looked upon with favor. Statutes are usually construed as operating on cases which come into existence after the statutes are passed, unless a retrospective effect is clearly intended."

There is nothing in the statute in question to indicate an intention on the part of the legislature to give it a retrospective effect. On the contrary, it is stated at the beginning of the act "that hereafter it shall be lawful," etc., plainly indicating an intention to give it a prospective effect only. Taking into consideration the language of the law, and the further fact that the rights of the interpleader were vested long prior to the time the law went into effect, we are of opinion that the rights of the interpleader are not affected by her failure to file her deed in the office of the county clerk. It follows that the judgment of the court below was right, and it is accordingly affirmed. Judgment affirmed.

**Millard C. Shires v. Washington Irwin, Louis C. Schrader  
and T. Jefferson Noble, School Directors, etc.**

1. **SCHOOLS—ELECTIONS—Location of School-house Sites.**—It is not lawful for a board of directors to purchase or locate a school-house site, or to purchase, build or move a school house or to levy a tax to extend schools beyond nine months, without a vote of the people at an election called and conducted as required by law. (R. S., Chap. 122, Sec. 151.)

2. **SAME—Sufficiency of Notice of Election.**—If a notice of a school election is reasonably sufficient to inform the voter as to the purposes of the election and the matters to be voted upon, it is sufficient. If the intention of the voter can be fairly ascertained from his ballot, though not in strict conformity to law, effect will be given to that intention.

3. **SAME—Election Not to be Nullified, When.**—An election can not be nullified by the mere neglect or omission of the election officers to make a proper return thereof.

**Appeal from the Circuit Court of Mercer County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.**

GUY C. SCOTT, attorney for appellant.

CONNELL & THOMASON, attorneys for appellees.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was a bill in equity exhibited by appellant against appellees as school directors of district No. 4, township 15 north, range 5 west, in the county of Mercer, to restrain them from building a school house in said district.

It is stated by appellees, and not denied by counsel for appellant, that the old school house in the district had been destroyed by fire, and as a consequence thereof, there was a proposition started in the district to change the site and build a new school house.

An election was held upon certain notices given and posted by appellees, and the contention is that the notices and ballots were insufficient to carry the proposition to

build a school house, although it is conceded that they were sufficient to carry the proposition to change the school-house site and borrow money.

The notices given were as follows:

"Public notice is hereby given that on the 14th day of January, A. D. 1899, an election will be held at Union Church, School District No. 4, Township No. fifteen, range No. five west of the fourth principal meridian, in county of Mercer and State of Illinois, for the purpose of voting 'for' or 'against' the proposition of changing the school-house site; also for the purpose of voting 'for' or 'against' the proposition to issue a bond of said district No. 4, to the amount of four hundred dollars, for the purpose of building a new school house, said bond to be paid one year from date of issue, with interest not to exceed seven per cent.

"The polls of said election will be opened at one o'clock P. M. and will remain open until four o'clock P. M.

"Dated this second day of January A. D. 1899."

An election was held at the time and place specified in the notices, at which thirty-four ballots were cast, upon eighteen of which appeared the words and figures following, to-wit:

"For the proposed school-house site the N. W. Cor. of the S. W. Qr. of section 29, house to be 20 rods south of the half section line.

"For issuing a bond to the amount of 4 hundred dollars to be paid one year from date with interest not to exceed 7 per cent."

Which was all that was written or contained upon any or either of the said eighteen ballots.

The remaining sixteen of said thirty-four ballots contained the following, to wit:

"For the present school-house site N. W. Cor. of S. W. Qr. of N. W. Qr. of Sec. 29, 1 acre.

"For issuing a bond to the amount of 4 hundred dollars to be paid one year from date with interest not to exceed 7 per cent."

Appellees, as officers of the election, made a return of the poll book to the school treasurer of the township as required by law, with a certificate thereon, in which certificate the



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questions submitted and the result of the election were stated. Said return is as follows :

"Special election held at Union Church, Dist. No. 4, in tp. 15, range No. 5 W., 4th P. M. in Mercer county, State of Ill., on Saturday, the 14th day of January, 1899, for the purpose of electing :

"For and against borrowing \$400, and issuing bond payable one year from date, int. not to exceed 7 per cent.

"For or against changing school-house site.

"For present school-house site of N. W. Cor. of S. W. of N. W. Sec. 29, received sixteen votes.

"For proposed school-house site N. W. Cor. S. W. quarter Sec. 29, house to be 20 rods south of the half Sec. line—received eighteen votes.

"For borrowing \$400 and issuing bond, payable one year from date, interest not to exceed 7 per cent, received thirty-four votes.

"We, the undersigned, do hereby certify that the foregoing is a true tally list and correct statement of votes cast at the said election, and that the proposed school-house site, viz.: N. W. Cor. S. W. Qr. Sec. 29, was carried by two votes; also that the proposition to borrow \$400 was carried by thirty-four votes.

"Dated this 14th day of Jan., 1899.

"T. J. NOBLE,

"Clerk of Election.

"L. C. SCHRADER,

"WASHINGTON IRWIN,

"Judges of Election."

After the election, appellees being about to let a contract on February 24, 1899, for the building of a new school-house, appellant, claiming to be a resident and taxpayer of the school district, filed the bill herein on behalf of himself and other taxpayers, setting up the facts above stated, and praying an injunction against appellees to restrain them from erecting a new school house with funds and credit of the district. A temporary injunction was granted by the master in chancery.

Answers were filed and a motion made in vacation to dissolve the injunction. Affidavits were filed in support of the bill, and appellees filed the affidavits of the eighteen persons who voted in the majority, stating that by the ballots they cast, they voted, and intended to vote, for building a new school house.

On a hearing the injunction was dissolved and at the next term of court the bill was dismissed for want of equity and the complainant prosecutes this appeal.

The only question to be determined is, whether the notices, and the ballots cast at this election held in pursuance thereof, were legally sufficient to authorize appellees to build the school house in contemplation.

By Sec. 151, Chap. 122, of the Revised Statutes, it is provided :

“ It shall not be lawful for a board of directors to purchase or locate a school-house site, or to purchase, build or move a school house, or to levy a tax to extend schools beyond nine months, without a vote of the people at an election called and conducted as required by section 4 of article 9 of this act.”

Section 4 referred to, provides for the manner of giving notice and holding the election, and requires that “ Such notices shall specify the place where such election is to be held, the time of opening and closing the polls, and the question or proposition to be voted upon.”

In the case at bar it is not claimed the notices were not given for a sufficient length of time, nor that they did not properly designate the time and place, but it is contended they were not sufficiently definite as to the proposition to build a school house.

It must be admitted that the notices might have been drawn with more definiteness as to the proposition to build a school house, but yet, considering the notice as a whole, we are of the opinion it was sufficiently specific to enable the voters to know and understand what they were to vote upon. It is conceded that all of the votes cast were in favor of the proposition to issue a bond of the district for \$400 to be paid one year from the date of its issue with interest not to exceed seven per cent. What was this bond to be issued for? Clearly, to raise money to build a new school house as stated in the notice. This was the proposition voted for and carried.

The notice given in this case was very similar to the one in *People v. Sisson*, 98 Ill. 335, which was held sufficiently

definite to meet the requirements of the law. Too great nicety or precision ought not to be required in elections of this character, where school officers are not supposed to be learned in the law nor versed in legal technicalities. If the notice is reasonably sufficient to inform the voter as to the purposes of the election and the matters to be voted upon, we think the election should not be invalidated for want of absolute definiteness.

We hold in this case that the notice was sufficient.

The objection made to the form of the ballots is of a somewhat more serious character. It is insisted by counsel for appellant that the ballots are entirely silent on the question of building a new school house. It is true the ballots cast do not specifically vote to build a new school house, but when taken in connection with the notice and the other propositions to be voted upon, can there be any doubt as to what the eighteen persons who voted in the majority intended by their votes? We think not. The district was without a school house. A proposition was before the people to change the school-house site and borrow the money to build a new school house.

We have held the notice of the election for the purpose of submitting these propositions sufficient. In pursuance of such notice the election was held, at which eighteen out of the thirty-four votes cast were "for the proposed school-house site N. W. Cor. S. W. quarter Section 29, house to be 20 rods south of the half section line. For borrowing \$400 and issuing bond payable one year from date, interest not to exceed 7 per cent."

Certainly no more technical rules should be applied to such an election than any ordinary election, and if not, then the general rule must prevail that if the intention of the voter can be fairly ascertained from his ballot, though not in strict conformity to law, effect will be given to that intention. (*McKinnon v. The People*, 110 Ill. 305; *Behrens-meyer v. Kreitz*, 135 Ill. 591.)

In the case last cited it was held that the ballot should be liberally construed and the intendments should be in

favor of a reading and construction which will render the ballot effective, rather than in favor of a conclusion which will, on some technical ground, render it ineffective. There can be no doubt of the wisdom and justice of this doctrine, and applying it to the ballots in question we can have no doubt as to the intention of those who cast the eighteen votes in the majority.

They filed a joint affidavit in support of appellees' answer to the bill, in which they all swear they intended to vote, and did vote, for building a new school house.

But without this affidavit, we are of the opinion the intention of the voters sufficiently appears so that their votes should be counted as having been cast in favor of the proposition to build a new school house.

A further point is made by counsel for appellant, that the returns of the election made by the directors to the school treasurer, only showed that two propositions were submitted to be voted upon, and that the building a new school house was not one of them.

A majority of the directors aver in their answer, that it was their intention by the notice given, to submit to the voters the proposition to build a new school house as well as to change the site and borrow money. All that can be said of the omission of that subject from their return of the election is, that it tends to contradict this statement in their answer. But we fail to see how the omission from the return would invalidate the election, if, as we hold, it was properly held, and the questions involved were fairly submitted to the voters.

If the position contended for by appellant is a correct one, then any election might be nullified by the mere neglect or omission of the election officers to make a proper return thereof. We are unwilling to give our assent to such a proposition, which would be in violation of the rule that effect must be given to the intention of the voters if that can be reasonably ascertained.

Our conclusion is that the decree was right and must be affirmed.

Stacker v. Allen.

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**Charles Stacker v. Charles Allen.**

1. *EVIDENCE—Of Subsequent Conditions.*—Evidence as to the condition of a ditch, subsequent to the date of an injury complained of from its overflow, is not competent, until proof has been made showing that there had been no change in the same since the time of the injury, or if there had been a change, showing what it was.

2. *INSTRUCTIONS—In Close Cases.*—Where the evidence is conflicting and the case a close one great care should be exercised to make the instructions clear and accurate.

**Appeal from the Circuit Court of Livingston County; the Hon. JOHN H. MOFFETT, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.**

A. C. NORTON and F. W. WINKLER, attorneys for appellant.

R. S. McILDUFF, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Since the year 1856 appellant has been the owner and in possession of the north half of the northeast quarter of section 8, township 26, range 7, in Livingston county. Appellee is the owner and in possession of the eighty acres lying immediately north of appellant's land, having purchased the same in the fall of 1892.

Appellant's land lies somewhat higher than the land immediately north of it, and the natural course of the drainage is toward the northwest. At the time appellant purchased his place there was a natural draw or depression in the surface, running from a point near the southeast corner thereof, in a northwesterly direction across his land and that now owned by appellee, to an outlet just beyond the northwest corner of the latter tract.

In 1866, to improve the drainage, appellant cut a furrow with a breaking plow in the draw, some two or three inches deep, and afterward, with the consent of the owner of the land, the ditch was deepened so as to increase its capacity.

Prior to the time appellee purchased his land, appellant had tiled his place, the outlet of the tile being a tile well located in the draw spoken of, on his north line, from which the water ran into the ditch. After appellee purchased his land he proposed to put tile in the ditch, and had some conversation with appellant in reference to the matter. Appellee stated that he was going to put in an eight-inch tile at his outlet and a four or five-inch tile at the south line of his land, where the water from appellant's tile well entered. Appellant contended that the tile proposed would not be sufficient to carry the water, and offered to pay the difference if appellee would put in a larger tile. This agreement appears to have been satisfactory to appellee, and it was suggested that a written contract be entered into between the parties, covering the agreement, but for some reason this contract was never signed, and no further steps were taken to carry it into effect. In December, 1893, appellee put in tiling of the size desired by appellant, but did not run it up to appellant's line, stopping at a point about thirty-one rods distant. Appellee placed a board over the end of the tile for the purpose of keeping out the dirt, which, however, appears to have seriously obstructed the flow of water. Appellant claims to have sustained injuries in 1895 and 1896, by reason of the flooding of his lands occasioned by the alleged obstruction of the natural drainage of the same by appellee, as above stated.

The declaration contains three counts, which, after alleging the existence of a natural water-course across the lands of the appellant and to and over the lands of appellee, charged: First, that appellee had obstructed the same by throwing and shoveling earth and other *debris* into it, and by plowing over and across the same, so as to flow water back upon appellant's land, by reason of which certain crops were lost to him in 1895 and 1896. Second, that appellee wrongfully plowed in and along the banks of said natural water-course and into and across the same, and threw large quantities of earth and other material into the same, filling it up, obstructing the flow of water, and refusing to remove the same when notified, whereby water was flowed

back, to the injury of appellant, drowning his crops and rendering his premises wet and swampy and less fit for use. Third, that appellee filled up said water-course and placed therein tile wholly insufficient to carry off the water and that the water-course was filled in such a careless, negligent and improper manner, that water flowed back upon and injured the land of appellant.

There was a trial and a verdict and judgment for appellee.

Upon the trial the county surveyor was permitted to testify as to the condition of the ditch between appellant's tile well and the head of the tile on appellee's land in September, 1897. This was long after the injury complained of was alleged to have occurred, and some ten months after the bringing of the suit. Counsel for appellant objected to this testimony, but the court permitted the witness to testify as to the condition of the ditch at the time he saw it, upon the statement of appellee's counsel that it would be shown that the ditch was in the same condition then that it was at the time of the alleged injury.

There was no attempt, however, made by appellee to show that there was no change in the condition of the ditch between the two dates. The court should not have permitted the surveyor to have testified as to the conditions existing at the time he saw the ditch until proof had been made showing there had been no change in the same since the time of the injury complained of, or, if there had been a change, showing what it was. In admitting this evidence appellant's case may have been seriously prejudiced. Appellee testified that there was a hog-tight fence all along appellant's north line; that the bottom of the fence was close to the ground, crossed a small swale and held back the water. Appellant testified that the portion of the division fence which held back water was appellee's part, and kept up by him, but this testimony of appellant was excluded by the court. We think appellant was entitled to have this testimony given to the jury, for the purpose of contradicting the testimony of appellee that the water was held back by appellant's fence.

The third instruction given for appellee confined the dam-

ages to injuries resulting from obstructions to the flow of water from the mouth of the tile on appellant's land. This was incorrect, for the reason that appellant had a right to the flow, not only of the water from the tile, but of all the surface water which would have naturally gone in that direction.

Instruction No. 6, given for appellee, confined the damages to injuries caused by the tiling put in by him. This was erroneous, for the reason that the declaration charged, in addition thereto, the filling of the ditch by plowing in and along the banks and across the same, and by throwing and shoveling earth and other *debris* therein; and evidence was introduced in support of these charges.

The evidence was conflicting and the case a close one, and great care should have been therefore exercised to make the instructions clear and accurate.

For the errors above named, the judgment will be reversed and the cause remanded.

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### Joseph Huber v. The People, etc.

1. VERDICTS—*In Criminal Cases*.—A verdict without evidence to support it is not to be sustained in a criminal prosecution, where it is required that the evidence should be sufficient to satisfy the minds of the jury beyond a reasonable doubt.

Indictment for selling liquor to minors. Error to the County Court of Rock Island County; the Hon. LUCIAN ADAMS, Judge, presiding. Heard in this court at the October term, 1899. Reversed. Opinion filed February 1, 1900.

M. R. HARRIS and J. L. HAAS, attorneys for plaintiff in error.

C. J. SEARLE, attorney for defendant in error.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

Plaintiff in error was indicted by the grand jury of Rock



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Huber v. The People.

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Island county for selling intoxicating liquor to minors. The indictment contained three counts: First, for selling liquor without a written order, etc., to Carl Lowe, a minor; second, for the sale of lager beer to said Carl Lowe, and third, for the sale of intoxicating liquor to Frank Ellinwood, a minor, without a written order, etc.

The case was certified to the County Court for trial, which was had before a jury, resulting in a verdict finding the defendant guilty on the second and third counts. A motion for new trial was overruled and a judgment entered upon the verdict imposing a fine of \$30 and costs on the second count of the indictment, and a like amount on the third count. The defendant prosecutes this writ of error and insists upon a reversal for various reasons assigned upon the record.

The only one we have deemed it necessary to consider is, whether or not the evidence was sufficient to sustain the conviction.

It appears from the evidence that Carl Lowe, a minor aged nineteen years, Frank Ellinwood, aged eighteen years, and an adult named Ed Patten, met in the city of Rock Island on April 20, 1898, and started for Moline for the purpose of enlisting in the militia; that before leaving Rock Island they entered the saloon of plaintiff in error, in company with each other; that Patten, the adult, called for three "beers," which were set out on the bar by plaintiff in error's bartender, and each of the three persons named, the two minors and Patten, drank one glass of the beer.

It further appears from the evidence that before they entered the saloon, Ellinwood gave Patten twenty-five cents with which to pay for the beer. On direct examination Lowe testified that Ellinwood paid for the beer, but this is squarely contradicted by Ellinwood, and on cross-examination Lowe nullifies the statement made on that subject in his direct examination. There was therefore no evidence upon which the jury could reasonably find that Ellinwood paid for the beer. There is no evidence whatever to show that the bartender knew or had any reason to suppose that Ellinwood furnished the money to pay for

the beer. Nor do there appear to have been any circumstances which ought to have put the bartender upon notice or inquiry. Patten called for the beer, and when it was set out on the bar, he took one glass himself and pushed one over to each of his comrades. This was all there was of it.

We think the case comes squarely within the rulings of the Supreme Court in *Siegel v. The People*, 106 Ill. 97. Indeed the case at bar is even weaker, if anything, than the *Siegel* case in some of its aspects.

Counsel for the people concede the *Siegel* case to be the law of this State and binding on this court, but insist that even under the decision therein contained the instruction given for the people in this case and the verdict of the jury can be sustained.

The trouble with the instruction is that it was not based upon the evidence. There was no evidence, or circumstances appearing in the evidence, from which the jury were warranted in finding that the bartender knew that Ellinwood and Lowe were using Patten as a screen for the purchase of the beer for themselves. True, as said in the *Siegel* case, "a case might oftentimes exist, undoubtedly, where the bar-keeper ought to know, from the circumstances, that the person purchasing is being used by a minor simply as a screen to conceal his own participation, and in such case the vendor should be held responsible. He may not close his eyes to obvious facts and then plead his ignorance to what all others knew; but in such case the fact should be left to the jury, to be determined from the evidence."

It is argued that the question was left to the jury in this case, and that having found the fact against plaintiff in error, their verdict ought to stand. But a finding without evidence upon which to base it ought not to be sustained. Particularly is this so in a criminal prosecution, where it is required that the evidence should be sufficient to satisfy the minds of the jury beyond a reasonable doubt.

We are of the opinion the verdict was not sustained by the evidence and that the conviction was not warranted by the law. The judgment will therefore be reversed.

Cowley v. Chicago & A. R. R. Co.

James Cowley, by his next friend, etc., v. Chicago & A.  
R. R. Co.

87	128
98	1479

1. VERDICTS—*Where the Court Will Direct for the Defendant.*—Where the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case, but may direct a verdict for the defendant.

2. PRACTICE—*On Motions to Exclude the Evidence.*—The rule that on a motion to exclude the evidence and direct a verdict the courts must not invade the province of the jury and pass upon the weight of the evidence, does not mean that if a single answer of a single witness standing by itself would make a case for plaintiff the court is thereby necessarily required to deny the motion.

Action in Case.—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

ELMER E. ROBERTS and McDougall & Chapman, attorneys for appellant.

DUNCAN & DOYLE, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court. James Cowley, a child fifteen months old, had his right foot injured by an engine of the Chicago & Alton Railroad Company. Two of the toes were removed by the medical attendant at that time, and two were removed a year later because of a muscular contraction rendering their amputation necessary. He brought this suit, by his next friend, to recover damages for the injury. Each count of the declaration charged that the engine was at the time passing along and through a certain alley. The various counts charged that the injury was caused by the engine being driven and managed carelessly and improperly, at an unreasonable, rapid and unsafe rate of speed, and at a speed in excess of six miles per hour, limited by an ordinance of the city of Streator, within which the accident occurred, and that the

servants of defendant in charge of said engine violated their duty in failing to keep a lookout to observe objects upon the railroad track. Defendant pleaded the general issue. At the first trial plaintiff had a verdict, which the court set aside. Before the second trial defendant, by leave of court, filed with its plea of general issue a notice of special matters intended to be relied upon as a defense at the trial, to wit, that said railroad track, where plaintiff was injured, was not situated upon a public alley, as alleged in the declaration, but was wholly upon private property of the Acme Coal Company, of which defendant and the Atchison, Topeka & Santa Fe Railroad Company were sole licensees, and that plaintiff at the time and place of the injury was trespassing thereon. On the second trial, at the close of all the evidence, the court, on motion of the defendant, excluded the evidence and directed a verdict for defendant, which was rendered and a judgment entered thereon. Plaintiff sued out this writ of error.

First. The allegation that at the place of the injury the engine was passing along and through an alley was not supported by any proof, but the contrary was proved. That part of the city was divided into lots, blocks, streets and alleys. The alley passed through that block. The Acme Coal Company bought a strip of land fourteen feet wide off the south end of the lots lying north of said alley in block one of a certain subdivision, and on that strip of land laid the railroad track in question, as a switch track to reach its mines not far distant. One of said lots was No. 10, about the middle of the block. Plaintiff's parents were tenants living upon that lot. There was a fence at the rear end of the part of the lot they occupied, about three or four feet from the nearest rail of the track, and in that fence an open gateway without a gate. There was no fence on the other side of the fourteen foot strip next to the alley. The railroad companies which had a license to pass over this track were not bound to fence it, under section 1 of the statute relating to fencing and operating railroads (T. W. & W. Ry. Co. v. Spangler, 71 Ill. 568), nor was a neglect to fence

alleged in the declaration. Plaintiff was very sick that day, and was placed by his mother under a tree in the yard fifty feet or so from that fence, and evidently passed through the gateway and reached the engine just as it went by.

Second. There was no proof of the allegation of failure to keep a lookout. Plaintiff's mother came to the door when the engine was just rounding a curve after it had passed about two hundred feet beyond where the child was hurt. She saw the child was not in the yard, and saw what she thought was the child on the railroad track, and went to where the child was, a distance of fifty feet according to her testimony, and seventy-five feet according to her husband. After picking up the child and noticing its injuries she looked at the engine, still in sight, near the switch, and could not see any one around the engine, either on the side or front. This has no tendency to prove the servants of defendant, when they approached and passed the child, were not at their proper places within the engine cab, keeping a proper lookout. The engineer testified he was at his proper place on the engine, on the opposite side from this gateway, looking ahead, and did not see the child, and that the tender in front of him as he backed down, prevented his seeing beyond the opposite side of the rails for a distance of forty to seventy feet; and that buildings on the rear of the other lots prevented his seeing into the lot occupied by plaintiff's parents, as he approached it. The fireman testified he was at his place on the engine performing his duties as fireman. The only blood found was on the outside of the rail nearest the gateway, and no part of plaintiff was injured except his foot, so that he evidently had not been between the rails.

Third. There was no proof the engine was running at a high or dangerous speed, or that it was improperly or carelessly managed.

Fourth. An ordinance of the city of Streator restricted the speed of the engine to six miles per hour, and plaintiff's mother testified when she saw the engine on the curve after it had passed some two hundred feet beyond her child, it

was running ten miles per hour. She does not appear to have had any experience in estimating the speed of engines and trains. She walked fifty or seventy-five feet thereafter, picked up her child and examined its injuries, and then looked again at the engine, and it was still near enough for her to make out its number and see that there was no one in front or on either side. When her direct and cross-examination are each carefully considered we think her estimate of its speed when she first saw it can have but little weight. The engineer and fireman testified they were running four or five miles per hour. It was shown that the rails were in bad condition for running. As we understand the evidence and plat, about 250 feet from where the plaintiff was hurt, and about fifty feet from where plaintiff's mother first saw the engine when she says it was running ten miles per hour, the engine was required to stop and did stop for the fireman to get off and arrange the switch leading to the main track. An engine running ten miles per hour travels 880 feet in each minute, or fifty feet in less than four seconds. It is well nigh incredible that the engineer would drive the engine at that speed when within fifty feet of the place where he must stop, or that he could have stopped at the main track, as the proof shows he did, if he had been running at that speed when only fifty feet away. The testimony of the engineer and fireman, accustomed to knowing the speed at which they are traveling, is not only more likely to be correct, but is far more reasonable. The only testimony on which a verdict for plaintiff could have been based was this statement of plaintiff's mother that the engine was running ten miles per hour when she first looked at it, before she knew her child had been hurt, and when she had no reason to suppose she was interested in its speed; and this was practically overcome by her further testimony showing that after she had gone to her child and examined its injuries the engine was but a short distance further away, as well as by the facts as to the distance within which the engine was compelled to stop, and also by the evidence of the engineer and fireman. On this state of the testimony a verdict for the

plaintiff could not have been sustained. The rule is that "when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." (*Offutt v. World's Columbian Exposition*, 175 Ill. 472.)

The rule that on a motion to exclude the evidence and direct a verdict the court must not invade the province of the jury and pass upon the weight of the evidence (*Goldie v. Werner*, 151 Ill. 551, *Boyce v. Tallerman*, 183 Ill. 115), does not mean that if a single answer of a single witness standing by itself would make a case for plaintiff, the court is thereby necessarily required to deny the motion. Such a motion is not to be granted unless there is a substantial failure of evidence tending to prove the plaintiff's cause of action or to prove some fact material thereto. But "evidence tending to prove the plaintiff's cause of action" means "evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff." (*Offutt v. World's Columbian Exposition*, *supra*.) We are of opinion the jury would have acted unreasonably if they had found that the engine was run at a speed which violated the ordinance, and that a verdict for plaintiff must have been set aside. The court was specially justified in acting under this rule after there had been one verdict for plaintiff which the court could not sustain.

Fifth. There was neither allegation nor proof that there was anything about this railroad track, its ties or rails, to appeal to childish instincts and curiosity and to attract to it an infant fifteen months old, and holding out an implied invitation to such a child, so as to require the railroad to guard its track against infant children, and there is therefore nothing to bring this case within the rule laid down in *City of Pekin v. McMahon*, 154 Ill. 141, and *Siddall v. Jansen*, 168 Ill. 43, relied upon by appellant in argument. Assuming that because of his extreme youth plaintiff was

not a trespasser upon the right of way, yet the defendant owed him no duty, at that place, upon private grounds, except to use all due diligence to prevent injury to him after he was discovered; and the proof is he was not seen at all by defendant's servants in charge of the engine. The judgment is affirmed.

**Leslie A. Gilmore, Eugene Munger and Julius D. Klein,  
v. The People, etc.**

1. *CRIMINAL PROCEDURE—Affidavits of Grand Jurors Can Not be Received to Impeach an Indictment.*—On grounds of public policy, affidavits of grand jurors can not be received to impeach an indictment found by them.

2. *SAME—Witnesses Names on Indictments.*—The name of a witness who is called, but refuses to testify before the grand jury, may be properly omitted from the back of the indictment.

3. *SAME—Organization of the Grand Jury—How Questioned.*—The organization of the grand jury can not be questioned in this State by a plea in abatement, but only by a challenge to the array or a motion to quash the indictment.

4. *SAME—What Pleading to an Indictment Admits.*—Pleading to an indictment admits its genuineness as a record, for an averment by way of plea can not be received against a record.

5. *SAME—Bills of Particulars.*—Whenever an indictment is so general as to give the defendant inadequate notice of the charge that he is expected to meet, the court will, on his application, require the prosecution to furnish him a bill of particulars of the evidence intended to be relied upon.

\* 6. *SAME—Reference to Defendant's Failure to Testify.*—The neglect of a defendant to testify in his own behalf in a criminal proceeding creates no presumption against him, and any reference or comment upon such neglect to testify, made by the prosecuting attorney, is error.

7. *SAME—What is No Defense.*—It is no defense to a criminal prosecution that the crime was committed against one who was also engaged with the defendants in another criminal enterprise.

Error to the Circuit Court of Carroll County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.

FRANK P. BLAIR, attorney for plaintiffs in error; J. M. HUNTER, of counsel.

87	128
e214s	576
87	128
e115	52



RALPH E. EATON, State's Attorney, and JOHN D. TURNBAUGH, attorneys for defendants in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

Leslie A. Gilmore, Eugene Munger, George Taber, Julius D. Klein and Harry Romaine, were indicted in the court below for a conspiracy to obtain the money of Roderick Chisholm and Ade O. Hileman by false pretenses and by means and use of the confidence game. Romaine was not put on trial. Taber pleaded guilty and testified for the prosecution. After certain proceedings hereafter stated, Gilmore, Munger and Klein pleaded not guilty, and were tried and convicted; Gilmore and Klein were fined, and all three were sentenced to imprisonment in the penitentiary, and they have sued out this writ of error.

Defendants filed a written motion to quash the indictment, assigning among other reasons that it was not sufficient in form, and that Taber was a witness before the grand jury and his name was not indorsed upon the back of the indictment. The form of the indictment is in the language of the statute, and is supported by *Thomas v. People*, 113 Ill. 531; *Ochs v. People*, 124 Ill. 399; *Graham v. People*, 181 Ill. 477, and other Illinois decisions. Defendants sought to prove Taber was a witness before the grand jury by the affidavits of grand jurors. On grounds of public policy these can not be received to impeach an indictment. (*Gitchell v. People*, 146 Ill. 175.) Other proof presented by the State showed that though Taber was called before the grand jury and sworn, he refused to testify, and did not testify before that body. His name was properly omitted from the back of the indictment, and the motion to quash was properly denied.

Thereafter defendants filed a plea in abatement, to which the court sustained a demurrer. The plea questioned the legality of the grand jury on the ground that the number of grand jurors selected by the county board was not "as near as may be a proportionate number from each town," as required by statute. The organization of a grand jury

can not be questioned in this State by a plea in abatement, but only by a challenge to the array or a motion to quash the indictment. (*Stone v. People*, 2 Scam. 326; *Barren v. People*, 73 Ill. 256; *McElhanon v. People*, 92 Ill. 369.) Pleading to an indictment admits its genuineness as a record, and an averment by way of plea can not be received against a record. (*Gitchell v. People*, *supra*.) Defendants did not challenge the array, and their written motion to quash the indictment did not attack the organization of the grand jury, nor did they, on the hearing of the motion, offer any proof concerning its selection.

Further, the plea shows there are fourteen towns in Carroll county; that one grand juror was selected from each town, and no more than two from any town, and we think it shows a reasonable compliance with the statute.

Defendants before pleading to the merits moved for a bill of particulars, and supported their motion by their joint affidavit, in which they set out the very general nature of the allegations in the several counts of the indictment, and its lack of that definiteness and particularity which would apprise them of the nature of the accusation against them, and that they desired a bill of particulars which would enable them to prepare their defense, and in case of acquittal or conviction to show by the record the identity of the crime charged, so that they might not be placed in jeopardy a second time for the same offense. Their affidavit further stated :

“That these defendants intend in good faith to defend themselves against the supposed crime intended to be alleged against them in said indictment; but that they are ignorant of the facts constituting the same, and can not safely go to trial herein until there shall be rendered to them a bill of particulars, or statement of the facts constituting the offense or crime intended to be charged against them, with such certainty as will apprise them of the nature of the accusation against them, and enable them to prepare their defense herein, and that such bill of particulars is important, material and necessary to the defense of the defendants in this cause.”

Defendant Munger also filed a separate petition under

oath for a bill of particulars, in which he stated that there were three indictments against him; that he was innocent of each charge against him; that he had not had a preliminary hearing upon any of said charges; that he did not know and had no information what evidence would be introduced against him, and that he could not learn the same from the indictments because of their general language; that he had made every effort to ascertain what the witnesses indorsed upon the indictment knew or claimed to know against him concerning said charges; that he needed a bill of particulars to insure him a fair trial; that he might not be surprised upon the trial; that he might make suitable preparation for trial, etc. No counter-showing was made by the State. The court refused to require a bill of particulars.

We can not concede the position taken by the State that an application for a bill of particulars is always addressed to the mere discretion of the trial court, and that its exercise hereof is never subject to review. Some counts of the indictment in *McDonald v. People*, 126 Ill. 150, were much like the indictment in this case. Upon this subject the court there said:

"Where the charge in an indictment is a general one, as is usually the case in an indictment of this character, it is a matter of great importance to the defendant to obtain a bill of particulars, in order that he may know specifically what he will be required to meet on the trial."

The court there quoted with approval from another court which spoke of "the reasons which require a specification," and from still another court to this effect:

"It is now a general rule, perfectly well established, that in all legal proceedings, civil or criminal, bills of particulars, or specifications of facts, may and will be ordered by the court whenever it is satisfied there is danger that otherwise a party may be deprived of his rights or that justice can not be done."

In *C. & N. W. R. R. Co. v. C. & E. R. R. Co.*, 112 Ill. 589 (a condemnation case), the trial court denied a motion to compel petitioner to file a certain plan and profile. The Supreme Court said:

"This motion was in the nature of an application for a bill of particulars, which is demandable in all kinds of actions and proceedings where, by reason of the generality of the claim or charge, the adverse party is unable to know, with reasonable certainty, what he is required to meet. (1 Tidd's Practice, 1st Am. Ed. 334-336.) The rule applies even to criminal proceedings as well as civil. Wharton, in his work on Criminal Law, Vol. 3, Sec. 3156, says: 'Whenever the indictment is so general as to give the defendant inadequate notice of the charge he is expected to meet, the court will, on his application, require the prosecution to furnish him a bill of particulars of the evidence intended to be relied upon.' The practice in this respect is founded upon the clearest principles of justice, and should not be departed from in any case where the circumstances require an application of the principle."

Some of the counts of this indictment charge a conspiracy to obtain the money of Chisholm and Hileman, and to cheat and defraud them of the same, by means and use of the confidence game. Others charge a conspiracy to obtain the money of Chisholm and Hileman by false pretenses. The nature of the confidence game is not stated. The false pretenses are not set out. The money is in some counts described as \$5,000 of money of the value of \$5,000, and in others as divers large sums of money amounting to the sum of \$5,000, and of the value of \$5,000. The details of the conspiracy are not set out. In every respect the indictment is as general as it could be drawn. We are of opinion the showing made entitled defendants to a bill of particulars as matter of right, and that such a bill was necessary to enable them to prepare their defense. The State suggests they were not harmed by its refusal because, near the close of the trial, a witness stated that as a justice of the peace he held a preliminary examination of the charge of conspiracy in the case of "The People against J. D. Klein and others," and therefore defendants must have been informed of the case against them by that examination. The witness did not state who were the other defendants before him besides Klein, nor the extent of that examination. Munger's sworn petition stated that he had not had a preliminary hearing, and did not know, and had no information of any kind

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whatever, of the matters, things, declarations and statements, if any, that would be introduced in evidence against him, except from the indictment. It also appeared that there were three indictments against the defendants, and they had a right to know whether the State intended at the trial of this case to prove and rely upon all the transactions between the parties, or only some special part thereof. The hardship entailed upon defendants by the denial of the bill of particulars was obvious at the trial. The defendants were charged with committing the crime in Carroll county. Many conversations and transactions relied upon by the State were had in Carroll county. Much of the money actually paid out by Chisholm and Hileman was paid in Carroll county. But it did not appear Munger was ever in Carroll county till after his arrest. Several different sums of money were paid by Chisholm and Hileman, but no one sum of \$5,000, nor did they all amount to \$5,000, and the sum finally refused was not \$5,000. The first pretenses claimed to have been false and fraudulent, and the first acts in the alleged conspiracy, were made and done in Carroll county on March 18, 1899. Most of the alleged false pretenses were made, and large sums of money were obtained from Chisholm and Hileman during the next thirty days, and much evidence was introduced covering that period. Gilmore was not shown to have had any connection whatever with the parties, the conspiracy, or the false pretenses till April 20th, only nine days before the last transaction put in evidence. Gilmore is not shown to have ever been in Carroll county till April 24th, only five days before the close of the period covered by the evidence. The trial lasted nine days. The great bulk of the evidence introduced related to conversations and transactions with which it was not shown that Gilmore was personally connected or acquainted. It is obvious the refusal of a bill of particulars deprived him of information to which he was entitled before the trial. For this error the judgment must be reversed.

The case which the State sought to prove was in part as

follows: Chisholm and Hileman were men of some wealth, living in Carroll county. Taber and Klein also lived in that county. Munger, Romaine and Gilmore lived in Chicago. Gilmore was an attorney. Romaine was represented to be a telegraph operator. It was represented to Chisholm and Hileman that Munger and Romaine had a scheme for tapping telegraph wires running to a pool room in Chicago, and conducting the wires into a room near by, intercepting and delaying reports of horse races, till one of them could go to the local pool room and bet on the winning horse; then sending on the report and winning large sums of money; that they had bought and partly paid for the necessary machinery, but needed \$337.50 more to enable them to complete the arrangements, and wanted some one to go in with them, furnish the remaining money needed, and share in the profits. Chisholm and Hileman accepted the offer and furnished the required money. Then followed, during the next twenty-five or thirty days, numerous calls for more money on various pretexts, such as that the machinery had been burnt out by an unusual charge of electricity upon the wires; that a "resister" was required; that the telegraph company had run a second wire to the pool room and sent part of the report over one wire and part over the other, and hence the machinery must be duplicated, etc. Chisholm and Hileman responded to these various demands, and prior to April 20th they had paid out \$2,600. Then they were notified that Munger and Romaine, who were known in these transactions as Vaughn and Martin, had been arrested by the police on a charge of tapping telegraph wires, in violation of the statute, and were confined in the central station, Chicago, and the machinery had been seized; that a lawyer named Gilmore had been hired and paid \$100 to defend them, and that \$500 was needed to get them out on "straw bail." Chisholm and Hileman furnished the money, and were afterward notified that Munger and Romaine had been released. Gilmore and Romaine then came to Carroll county and had an interview with all the parties, except Munger. Gilmore stated that the offense

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of tapping wires was punishable by imprisonment in the penitentiary or a heavy fine; that the possession of the machinery by the police, which he said was at the central station, furnished serious evidence against them all; that that was all the evidence the police had, and if they could get the machinery back it would destroy all evidence of guilt; that he thought he could buy off the police, get the machinery back, and square everything, for about \$2,000; and Romaine stated that the machinery could be returned to the house from which it was bought at a discount of ten or twenty-five per cent, so that there would be no great loss. Gilmore returned to Chicago to ascertain the exact amount required, and wired back it would take \$2,100. Chisholm and Hileman raised that sum and placed a draft therefor in the hands of Taber to take to Chicago. Meanwhile Hileman had stated the facts to his brother-in-law, W. Scott Cowen, and the latter went to Chicago to investigate the matter. He rode on the train with defendant Klein, and the latter, after a long conversation, told Cowen that this was really a scheme to get money out of Chisholm and Hileman. Cowen consulted a Chicago lawyer whom he knew, named George C. Mastin, a former resident of Carroll county, and brought Mastin back with him that night. They got Chisholm, Hileman and Taber together, and induced Taber to surrender the draft for \$2,100. Mastin returned to Chicago and called upon Gilmore to learn the facts, the danger of his clients, and the necessity for their paying out \$2,100. After some discussion Gilmore told him Munger and Romaine had been arrested, but that the story of their having been placed in the central station was a "fake;" that Chisholm was badly scared and was raising money to escape, and would give up a good many thousand dollars rather than be punished; that the guilt of the parties was so evident that they could not be defended; that he was expecting Taber in with \$2,100; that if Mastin would advise his clients to give up the \$2,100 he (Mastin) should have one-third of it; and the balance had to be divided between himself and another; that the payment of \$2,100

would be much less punishment than they would suffer if they were arrested and sent to the penitentiary; that if they paid the \$2,100 they would be relieved from all danger of prosecution and arrest; that he represented Romaine and Munger, and also represented the party who had caused their arrest, and also the party who had furnished their bonds, and that he controlled the situation. Mastin retired and sent Gilmore a note saying that upon consideration he found he could not with honor either consider or accept his suggestion. Mastin and Gilmore met again next day, and Gilmore told Mastin that the latter did not correctly get the import of his remarks the day before, and gave Mastin the name of the justice before whom the prosecution of Munger and Romaine (under the names Vaughn and Martin) was pending, and the date to which the hearing had been continued. Mastin told Gilmore he believed his clients would resist any efforts to induce them to give more money to save them from any sort of prosecution. The \$2,100 was not paid, but this prosecution was instituted. It was shown that Munger and Romaine had never been confined in the central station, either under their own names or the names Vaughn and Martin, nor had any such machinery been there; that wire-tapping machinery of the kind described would cost but a few dollars, and that the most expensive machinery would not have cost over \$350. There was evidence slightly tending to show that wires were in fact tapped and two bets on horse races made, and counter evidence casting much doubt upon the existence of any wiring, tapping or betting by any of these parties. Chisholm and Hileman were at least made to believe that wires had been tapped and bets made. Many conversations, representations and acts were proven, to which we deem it unnecessary to refer.

The defense offered but little testimony. They showed a prosecution under the statute for tapping telegraph wires had been instituted against Vaughn and Martin; that said defendants had been arrested, had given bail, and that the case had been continued, and afterward it was dismissed for



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want of prosecution. Proof was offered tending to contradict Martin in some of the details he gave of his visit to Gilmore's office. The defense contend that the credibility of Chisholm and Hileman is affected by the criminality of the enterprise in which they were, or supposed they were, engaged; that Taber's credibility is affected by his confessed guilt; that if any crime is shown, it was committed in Cook county, and not in Carroll county; and that as Chisholm and Hileman were engaged with defendants in a criminal transaction, none of them can be convicted for cheating or attempting to cheat a confederate therein.

The defendants who were on trial did not testify in their own behalf. Sec. 6 of Div. 13 of the Criminal Code, which removes the disqualification of a defendant in a criminal case to testify, further provides that "a defendant in a criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." During the argument of the State's attorney to the jury he said:

"Mastin may have been mistaken about the door in Gilmore's office, but if his testimony be not true Gilmore could have taken the witness stand and contradicted him, word for word."

Gilmore excepted to these remarks and the court said, "Mr. Eaton, that is not proper." The State's attorney continued as follows :

"I would have no right to say so, your honor, but Gilmore brought it up in his argument. Gentlemen of the jury, Gilmore said his mouth was sealed, and that he could not go on there and contradict Mastin. Now, gentlemen of the jury, I would have no right to say anything about this except that he brought it up in his argument himself. I say that when Gilmore told that, he knew he was telling a falsehood to the jury, and I tell him in the presence of his honor, the court, that he had the right to go upon that witness stand and contradict Mastin word for word."

Gilmore objected to these remarks on the ground that he

had made no such remark, and that the same violated his constitutional right, and requested the court to adjure the jury to disregard said remarks of counsel, but the court failed to do so, to which refusal of the court Gilmore excepted.

The record discloses that Gilmore examined witnesses in his own behalf and cross-examined some of the witnesses against him. The inference from the remarks of the State's attorney would be that Gilmore had also addressed the jury in his own behalf, though that does not otherwise appear. The State's attorney sought to justify his remark to the jury by the claim that Gilmore had told the jury he was not permitted to testify. Gilmore denied he had so stated. If Gilmore had made any statement which opened the door for these remarks the trial judge should, and we must assume would, have caused the facts to be stated in the bill of exceptions. It was also the duty of the State's attorney to see that the facts upon the subject were incorporated in the bill of exceptions. In its silence we can not assume that the State's attorney had any warrant for this violation of the defendant's statutory rights. In every case where this question has been presented to our Supreme Court (so far as we are advised), if there had been a direct reference by the State to the failure of the defendant to testify, it has been held to require a reversal, unless the guilt of the defendant was so evident that the jury could have reached no other conclusion. (*Angelo v. People*, 96 Ill. 209; *Austin v. People*, 102 Ill. 261; *Baker v. People*, 105 Ill. 452; *Quinn v. People*, 123 Ill. 333.) The *Quinn* case was reversed solely because an attorney who was assisting the State's attorney in his argument to the jury asked why, if certain evidence was not true, defendant did not go upon the witness stand and deny it. In that case the trial judge stopped the attorney and told the jury his remarks were improper. But the court said the words had served their purpose and the effect upon the jury could not be removed by the declaration of the judge. In the *Austin* case the court said that the statute can only be completely enforced by adopting it as a rule of practice that such improper and forbidden reference

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by counsel for the prosecution shall be regarded as good ground for a new trial in all cases where the proofs of guilt are not so clear and convincing that the court can say affirmatively the accused could not have been harmed from that cause.

“In the absence of most satisfactory proof of guilt, no conviction, obtained through a palpable and willful violation of law (to the prejudice of the accused) done by the officers of the law conducting the prosecution, should be allowed to stand.”

The conviction of Gilmore rests upon the evidence of Mastin. Aside from the testimony given by Mastin, Gilmore's acts appeared to be those of an attorney seeking to extricate clients from a serious position; and though the means he proposed were grossly illegal, that would not convict him of this crime. Gilmore introduced two witnesses to prove facts as to the circumstances of the interview tending to contradict Mastin. He had a right to have his case go to the jury unprejudiced by comments upon the fact that he had failed to avail himself of his privilege to testify. The language of the State's attorney therefore requires a new trial; and its effect could not fail to be prejudicial to the other defendants also. The jury could hardly fail to understand that the other defendants also could have testified.

We see no substantial and reversible error in the rulings of the court upon the evidence. The letter from Mastin to Gilmore was competent evidence for the State, because it was followed by another conversation between those parties which Gilmore began with a reference to the contents of the letter.

The defense asked instructions based upon the theory that if Chisholm and Hileman were engaged in a criminal transaction with defendants, and in that transaction defendants cheated Chisholm and Hileman and defrauded them of their money, then the defendants could not be convicted. These instructions the court refused. The State asked instructions based upon the contrary doctrine, that the fact that Chisholm and Hileman were engaged in a criminal

transaction with defendants would not exonerate defendants if they had committed against Chisholm and Hileman the crime charged in the indictment. These instructions the court gave. The rule contended for by defendants is based chiefly upon the majority opinion in *McCord v. People*, 46 N. Y. 470, and upon *State v. Crowley*, 41 Wis. 271. In the former the rule was thus stated :

“Neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices. The design of the law is to protect those who, for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods.”

We entirely approve the doctrine as applied to a civil suit between rogues for contribution or reimbursement, but we think it has no proper application to a criminal prosecution against one of several wrongdoers for a crime committed against a fellow-criminal. Though the aggrieved fellow-wrongdoer may be the one who makes the complaint, yet it is not necessary that he seek or desire the prosecution. Any one who knows that a crime has been committed may initiate the prosecution. The complaining witness, whether he is or is not the person defrauded, can not control or settle or abandon a prosecution once begun. The proceeding is not one to enforce civil rights. It is a prosecution of the crime of the public wrong done to the people generally by the violation of a public law. The people are entitled to have the criminal punished on public grounds, for the suppression of crime and for the protection of the public against other like crimes, no matter how unworthy the source from which the proof may come. One crime can not be permitted to become a shield against the punishment of another crime. One who has committed a crime ought not to escape punishment by showing that another person ought also to be punished for the same or another crime. Public policy requires that both be punished, and not that both be permitted to escape because

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of their mutual relations. These views find full expression and illustration in *People v. Hennsler*, 48 Mich. 49; *People v. Watson*, 75 Mich. 578; *Commonwealth v. Morrill*, 62 Mass. 571; *Patterson v. State* (N. J.), 40 Atl. Rep. 773; *In re Cummins*, 16 Colo. 451. We are of opinion these cases rest on sound legal principles and state a salutary rule. See also the dissenting opinion of Peckham, J., in *McCord v. People*, *supra*. This precise question seems not to have been decided in this State, but a conviction was sustained in *Maxwell v. People*, 158 Ill. 248, where the prosecuting witness was cheated while he was, as he supposed, assisting the defendant in cheating another person. We approve the rulings of the trial court on this subject.

The instruction given for the people, defining "overt act," was so general as to be inaccurate as applied to this case. There was proof of overt acts in Carroll county sufficient to justify the verdict as to the venue. Taber had pleaded guilty and turned State's evidence, and his cross-examination was unduly restricted. Some other rulings are perhaps open to criticism, but they are not likely to occur on another trial, and we think they do not require discussion here.

For the errors indicated, the judgment against Gilmore, Munger and Klein is reversed, and the cause is remanded for a new trial.

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**James G. Heggie and John Heggie, Partners, etc., v.  
Ezekiel Smith and Patrick J. Sexton.**

1. COLLATERAL UNDERTAKINGS—*Statute of Frauds*.—An oral promise, by a managing partner in a firm of contractors, that if a sub-contractor did not pay for certain implements previously ordered by such sub-contractor, he, said managing partner, would, is a collateral promise within the statute of frauds, and not binding upon the firm of which such promisor was a member.

**Assumpsit.**—Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

GARNSEY & KNOX, attorneys for appellants.

HILL, HAVEN & HILL, attorneys for appellees.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

Appellants brought this suit in assumpsit against appellees, to recover the price of seventeen iron "skips," amounting to \$1,020, which skips were manufactured by appellants and delivered to Dion Geraldine, who was a subcontractor under appellees on the sanitary drainage canal.

Appellants were boiler-makers in the city of Joliet, and manufactured the skips in question upon an order given to them by Geraldine. Thus far there is no dispute, but the claim of appellants is, that the skips were delivered for the use and benefit of appellees, to be used by the latter in their work upon the main channel of the sanitary district of Chicago, upon which they were contractors.

The declaration contained only the common counts, and the only plea upon which the case was tried was the general issue.

A jury was waived and the cause tried by the court. The court found in favor of the defendants, and after overruling a motion for a new trial rendered judgment ~~against~~ the plaintiffs for costs, and they prosecute this appeal.

It appears from the evidence that, in July, 1892, the McCormick Construction Company became contractors to perform certain work upon a part of the main channel of the sanitary district, known as section 14.

Appellee succeeded to the rights of the McCormick Co. in their contract to this work. Geraldine became a subcontractor under appellees, to take out of the channel certain rock after it had been blasted. To perform this work he required the use of what are termed "skips," which were fashioned like a large scraper, into which the stone, after being blasted, was thrown by hand, and then the skips and contents were lifted out upon the bank, and there the stone

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was discharged. These skips cost about \$60 each, and quite a number were required in order to do the work. Geraldine placed with appellant an order for ten skips, which were manufactured and delivered to him in August, 1894, and subsequently paid for by appellees in January or February, 1895.

In September, 1894, Geraldine needed more skips, and placed an order with appellants for an additional twenty, which were manufactured and delivered in October. In November or December, 1894, Geraldine gave an order for another twenty skips, but as appellants had not then been paid for any of those theretofore furnished, they only delivered three on the last order. Before the other seventeen were delivered, appellants claim that Ezekiel Smith, the managing partner of appellees' firm, came to their works and represented that they were in desperate need of the skips, because they were not getting out the monthly requirements under their contract with the drainage district; that they must have the skips, and if Geraldine did not pay for them he would. Appellants then delivered the seventeen skips, being the remainder of the last order for twenty, the price being \$60 each, or a total of \$1,020.

The only question for determination by the court was, whether appellees made a promise to pay for the skips which was binding upon them as an original undertaking.

The alleged promise, which it is to be observed is absolutely denied by Mr. Smith, was not in writing, and if only collateral to the liability of Geraldine, was void under the statute of frauds. Whether a promise is an original or collateral undertaking is frequently a question of great difficulty, but in the case at bar we think it is one of comparatively easy solution. The promise, as testified to by appellant, was, that if Geraldine did not pay for the skips, appellees would pay for them. The language standing alone imports simply a collateral undertaking; but further than this, the skips were charged to Geraldine upon the books of appellants; the bills were made out to him, and payment thereof was frequently demanded from him. There was, therefore,

a binding and subsisting obligation on the part of Geraldine to appellants, to which the promise of appellees, if made, was collateral. In other words, the party for whom the promise was made, was liable to the party to whom it was made. (*Resseter v. Waterman*, 151 Ill. 169-176, and cases cited.)

This seems to be one of the tests in determining whether the undertaking is original or collateral only. Under the authorities we are clearly of the opinion the promise, if made as claimed, was collateral to the original obligation of Geraldine, and was not binding or enforceable unless made in writing. (*Eddy et al. v. Roberts*, 17 Ill. 436; *Blank v. Dreher*, 25 Ill. 331; *Williams v. Corbet*, 28 Ill. 262; *Hughes v. Atkins*, 41 Ill. 213.)

Many other cases might be cited in support of the view we take of the case, but these are abundantly sufficient.

It is assigned for error that the court refused to hold, as the law of the case, propositions numbered one, two and four, offered by appellants.

The first proposition asked the court to hold that when goods are sold to one person on the verbal promise of a third party to pay for them, and such goods are charged to such person in an account against him, the vendor may show, notwithstanding such charge on the books, that the goods were actually sold on the strength of the promise of such third party and that the vendor relied thereon.

As a bare proposition of law this may be correct, but we think it was not applicable to the facts as shown by the evidence. Appellants did not show, or offer to show, that there was any mistake in charging the skips to Geraldine. The undisputed facts are, that if appellants relied upon any promise of appellees in delivering the skips it was a promise to pay if Geraldine did not. Under the evidence we think there was no error in refusing the proposition.

The second proposition was too narrow in its scope, and sought to put the determination of the question as to whether or not the promise was within the statute of frauds, upon the sole purpose and object of the promisor in mak-



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ing the promise. In this case it may be that appellees were interested in having Geraldine obtain the skips, so that his work might not be delayed under the sub-contract, but that fact alone would not make their promise an original undertaking, if in fact they only promised to pay if Geraldine did not. There was no error in the refusal.

The fourth proposition really asked the court to pass on a question of fact, which it was not bound to do, and hence it was properly refused.

Finding no error in the record, the judgment will be affirmed.

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### James Whipple v. The People ex rel.

1. CONSTRUCTION OF STATUTES—*Act of 1895—Dividing of Towns into Road Districts.*—The division of a town into road districts once, under the act of 1895 (Laws 1895, 318) does not bind the town for all time to come, regardless of changing conditions; and if the officers upon whom devolved the duty of dividing the town are of opinion that the first division is unequal and unjust, and not in accordance with the provisions of the statute, they are not without power to make another division in compliance with the law.

**Mandamus.**—Error to the Circuit Court of De Kalb County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the October term, 1899. Reversed. Opinion filed February 1, 1900.

GEORGE BROWN and CLIFFE & CLIFFE, attorneys for plaintiff in error.

HENRY S. EARLY, State's Attorney, for defendant in error; CARNES & DUNTON, of counsel.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was a proceeding in the nature of a *quo warranto*, instituted by the State's attorney upon the relation of Nathaniel Buzzell, against plaintiff in error, to contest his title

to the office of commissioner of highways of the township of Sycamore, in De Kalb county.

The only question in the case is as to the validity of certain proceedings, whereby the township of Sycamore was divided into road commissioner's districts, under an amendment to Sec. 16, Chap. 139, of the Revised Statutes. (Hurd's Stat. 1897, p. 1592, Sec. 16.) This amendment to the former statute went into effect July 1, 1895. After providing for the election of commissioners of highways, it is further provided :

"It shall be the duty of the commissioners of highways, together with the town clerk and supervisor, to meet within ten days after the next town meeting after the passage of this act in each town, and divide each township into three districts, to be known as road commissioner's districts numbers one, two and three, dividing the township as near into three equal divisions as possible, taking into consideration extent of territory and population, in making and forming boundaries of such districts, and a plat of each district, to be filed in the office of the town clerk of said town."

It is declared in the act :

"The purpose of such division is to have the different portions of each township represented by a commissioner of highways who is a resident of such district, and when a vacancy occurs, such vacancy shall be filled either by election or appointment, as the case may be, by a resident of said district where such vacancy occurs."

It appears from the evidence that on April 14, 1896, being within ten days after the first annual town meeting subsequent to the taking effect of said amended section 16, the commissioners of highways, supervisor and town clerk of the township of Sycamore, met at the office of the town clerk and divided the township into three road districts, properly describing the territory embraced in each, and of which they made a map, which was filed in the office of the town clerk. At that time there were three commissioners of highways in said town, of whom plaintiff in error was one, his term of office expiring in April, 1897.

The record of the town clerk, introduced in evidence, shows the following further proceedings, to wit :

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"STATE OF ILLINOIS, )  
 De Kalb County,        } ss.  
 Town of Sycamore. }

At a regular meeting of the commissioners of highways of said town, held at the office of the town clerk of the said town, on the 23d of January, A. D. 1897, there being present James Maitland, John Swanson and James Whipple, commissioners of highways of said town, and Henry C. Whittemore, supervisor, and C. D. Rogers, town clerk of said town, on complaint of said John Swanson that the division of said town into commissioner's road districts, as heretofore made, a record of which appears on pages 160 and 161 herein, is unequal and was not made in accordance with the law providing for the division of towns into road districts, that thereupon the said John Swanson moves that the record heretofore made on pages 160 and 161 be amended and corrected, and re-division made as follows, to wit:

That commissioner's road district number one shall embrace sections one to twelve, inclusive, as indicated on the plat of said town on page 163.

That commissioner's road district number two shall embrace sections thirteen to twenty-four, inclusive, as indicated on said plat.

That commissioner's road district number three shall embrace sections twenty-five to thirty-six, inclusive, as indicated on said plat.

Which said motion was duly carried, and said town was divided into road districts as above, as shown on plat on page 163.

Plat of road districts of the town of Sycamore aforesaid:

## NORTH.

6	5	4 District	3 No. 1.	2	1
7	8	9	10	11	12
18	17	16 District	15 No. 2.	14	13
19	20	21	22	23	24
30	29	28 District	27 No. 3.	26	25
31	32	33	34	35	36

## SOUTH.

CLARENCE D. ROGERS,  
Town Clerk."

The evidence shows that the division made January 23, 1897, was the one under which the commissioners acted from that date until the time of the annual town meeting in April, 1897, and that plaintiff in error lived in district numbered one upon the plat of said last mentioned division, and had charge of the same; that his term of office expired and he was, at the annual town meeting in April, 1897, re-elected for a term of three years. It is conceded that he was legally elected, provided the division of the township into road districts at the meeting on January 23, 1897, was legal and binding. But on behalf of the people it is contended that the action of the commissioners of highways, town clerk and supervisor, had on April 14, 1898, was legal and binding and exhausted their power and authority on the subject, and, as a consequence, the action of the same parties on January 23, 1897, was illegal, null and void.

If this contention is correct, then it must be conceded that plaintiff in error was not legally elected at the annual town meeting in April, 1897, for the reason that he was not a resident of the district for which he was elected and there was no vacancy in that district.

We are not disposed to take so narrow a view of the statute as that contended for by counsel for the people. The questions are not the same as were involved in *People v. Hutchinson*, 172 Ill. 486, so largely relied upon by defendant in error, and hence we do not regard that case as of controlling force in this.

Had section 16, under consideration, provided that at the annual town meeting after the passage of the act, and every ten years thereafter, the township should be divided into road districts, the cases would have been more nearly alike. But the statute contains no such provision, and if the contention of counsel for the people is to prevail, then a division once made must remain binding and in full force for all future time, until the legislature shall see fit to make some change in the law.

To so hold might work hardship and injustice, when we have in mind the ever-changing conditions in the development of a still comparatively new country. We are of opinion that the division of a town into road districts once, does not bind the town for all the time to come, regardless of changing conditions, and if the officers upon whom devolved the duty of dividing the town were of opinion that the first division was unequal and unjust, and not in accordance with the provisions of the statute, they were not without power to make a proper division in compliance with the law upon that subject. The court below appears to have taken a contrary view, holding, by propositions of law, the first division valid and final, and the second unauthorized and void. A judgment of ouster was entered against plaintiff in error and he brought the cause to this court for review. We think the court erred in its holdings upon propositions of law and in entering judgment against plaintiff in error. The judgment will therefore be reversed.

**Village of Lockport v. William S. Shields.**

1. *CONTRACTS—Repudiation and Abandonment.*—Where one party by his acts repudiates his contract, and makes its performance impossible by the other party, such party will have the right to treat it as at an end, and sue for and recover the profits he would have realized if he had not been prevented from performing.

Error to the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

JOHN W. D'ARCY, attorney for plaintiff in error.

HIGGINS & WALTER and J. W. DOWNEY, attorneys for defendant in error.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of assumpsit, by defendant in error against plaintiff in error, to recover a balance claimed to be due him for services as a civil engineer, in the matter of the proposed construction of a system of water-works in the village of Lockport. The declaration contained special counts upon an alleged contract, and also the common counts, to which the defendant pleaded the general issue, a plea of payment, and a third plea traversing the allegations of the special counts in the declaration. There was a trial by jury resulting in a verdict for plaintiff for the sum of \$1,763.94, upon which the court entered judgment after overruling a motion for new trial. The village brings the cause to this court for review, and assigns for error that the court admitted improper evidence for the plaintiff, refused proper evidence offered by the defendant, gave improper instructions for plaintiff and refused proper instructions asked by defendant; that the court erred in refusing the motion for a new trial and entering judgment on the verdict.

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Village of Lockport v. Shields.

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It appears from the evidence that in the summer of 1895 plaintiff in error became desirous of constructing a system of water-works in the village, and on August 12th of that year employed defendant in error to prepare plans and specifications for a pumping station, well, machinery and mains for the conduct of the water to the various parts of the village. That on August 30, 1895, the village board adopted an ordinance known as "107," providing for the issuing of bonds to the amount of \$10,700, with which to construct such water-works. That the plans prepared by defendant in error, with some modifications as to size and capacity of machinery, were adopted by the village board, and he received \$400 in payment for such plans, specifications and a map of the village, in full for the services performed by him up to and including the evening of September 10, 1895. On that evening he was employed by the board "to superintend the construction of the water-works system for five per cent of the cost of same."

The pumping station was built, the well drilled and reservoir constructed at the location called for in the plans of defendant in error and connections made therewith. After the reservoir was supposed to be completed it was found to leak, and defendant in error directed certain changes to be made therein so as to make it water-tight, according to the specifications and contract therefor, but it is complained by plaintiff in error that after the extra work was performed on the reservoir it still continued to leak, whereby it is insisted the reservoir became worthless and of no value to plaintiff in error, and it claims the right to recoup the damages arising therefrom against any demand which defendant in error may have on account of his contract and services.

The contract for the water-mains was awarded to Gaffney & Long, of Chicago, the work to be performed under the supervision of defendant in error, and the contract expressly provided that he should be the judge as to the manner of doing the work and the rate of progress made thereunder, and that the work should be commenced when the assessment roll was confirmed, and should be fully completed on

or before May 1, 1896. The contractors expressly agreed to assume all risk with regard to the special assessment, and the village was to use due diligence in obtaining confirmation of the assessment. The assessment for the improvement was confirmed in the County Court of Will County, on March 3, 1896, and the village clerk at once notified Gaffney & Long of that fact and to proceed with their work under the contract.

But on March 4th exceptions to this judgment of confirmation were taken by a large number of objectors, and an appeal prayed to the Supreme Court, which was allowed upon condition that the parties appealing filed a bond and presented a bill of exceptions within sixty days from that date.

It further appears that no work was ever done by Gaffney & Long under their contract for laying the mains, and a change of village administration having taken place on May 1st, the village board, on May 4th, passed an ordinance directing the village attorney to release the assessment of record against the lands affected thereby, and the scheme of laying the mains and completing the water-works system seems to have been abandoned, and no further efforts were made to carry out the original plan in relation thereto.

The contracts let for the construction of the work, added to about \$2,400 of extras, amounted to \$47,278.99, as nearly as we can ascertain the same from the record, and upon this amount defendant in error claimed a commission of five per cent under his contract with the village board, amounting to the sum of \$2,363.90, of which he had been paid \$600, leaving due him, as he claimed, \$1,762.94.

It is not disputed that defendant in error was regularly employed by the village board of plaintiff in error, to superintend the construction of the water-works system, and that his compensation therefor was to be five per cent upon the cost of the same, and that he entered upon the discharge of his duties under such employment by preparing the necessary plans, ordinances, advertisements for bids, contracts and specifications, maps, plats and blue prints, showing



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the proposed water-works system, distribution of mains, depth and size of pipes, location of hydrants, service pipes, and cocks; and, in short, making a complete plan of the proposed water-works, including all the necessary surveys therefor.

It is insisted by counsel for plaintiff in error that defendant in error was not entitled to commissions on the amount of the contract let to Gaffney & Long, because the work contracted for was never performed. This would be true provided defendant in error was responsible for the failure of Gaffney & Long to complete their contract. But it is to be observed that the Gaffney & Long contract contained a provision that payment thereunder should be made solely out of the special assessment to be levied under ordinance 107, and a further provision that the contractors assumed all risk in prosecuting the work before the assessment was confirmed. As we have already seen, the judgment of confirmation was entered March 3d, but on the following day, March 4th, an appeal to the Supreme Court was granted and sixty days allowed in which to file bond and bill of exceptions. This time would expire on May 4th, and on that day the village board ordered the assessment released of record, and thereby abandoned the further prosecution of the enterprise. The granting of the appeal amounted substantially to a suspension of the judgment of confirmation, and as payment for the work was to be made solely out of the proceeds of the assessment, it would be unreasonable to hold that Gaffney & Long should have gone on with their contract under the circumstances. After the appeal was granted they could not know that the assessment would ever be confirmed, and we fail to see from the evidence how defendant in error was responsible for the delay. He could not have compelled Gaffney & Long to proceed under their contract, nor was he to blame for not trying to do that which it was impossible for him to accomplish. By their own acts, the village authorities placed it out of the power of Gaffney & Long to obtain any pay for their work, if they had carried out their contract, and therefore they

could not be expected to perform. As a consequence of the same acts of the village authorities, defendant in error was prevented, without his fault, from superintending that portion of the work specified in the Gaffney & Long contract, although ready and willing to do so.

We are of the opinion plaintiff in error could not thus avoid its liability to pay defendant in error the contract price agreed upon for superintending the construction of the whole work. The case seems to fall within the principles laid down in *L. S. & M. S. Ry. Co. v. Richards*, 152 Ill. 59.

Plaintiff in error by its acts repudiated the contract and made it impossible of performance, and defendant had a right to treat it as at an end, and sue for the profits he would have realized if he had not been prevented from performing.

We think there was no error in the first instruction given for the plaintiff below. It properly stated the law applicable to plaintiff's theory of the case and was warranted by the evidence. It did not eliminate any question of fact from the consideration of the jury, as claimed by counsel for plaintiff in error. The use of the word "total" in the instruction was not improper. It was for the court to construe the contract, which, so far as plaintiff in error is concerned, was in writing, and found upon its own records. The employment was, "to superintend the construction of the water-works system, for five per cent of the cost of the same." Although the word "total" is not used, we are of opinion it would add nothing to the meaning of the sentence. Five per cent upon the cost could not well be held to mean anything else than five per cent upon the entire or total cost.

The point is made by counsel for plaintiff in error that the village of Lockport could not legally contract for the services of defendant in error at five per cent of the cost of the proposed work, when said cost exceeded \$10,700, because, he claims, the evidence does not show any appropriation for a greater amount. No question of this kind was raised in the pleadings, by motion to direct a verdict, or in any

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instruction to the jury, nor do we find it was at any time made in the court below. Not even in the motion for a new trial was any such objection made or referred to.

Without going into the merits of the proposition, we think it sufficient to hold that the objection comes too late, and can not be raised for the first time in this court.

It is also insisted by plaintiff in error that defendant in error was not entitled to recover the unpaid balance of \$270 commissions on the cost of that portion of the water-works system actually constructed, because of the leakage of the reservoir; it being argued that he drew the plans, selected the location and superintended the construction, and was therefore responsible for the failure of the reservoir to answer the purpose intended, whereby it is claimed \$2,400 of the village money was expended for which it received no benefit. As we have already said, plaintiff in error sought on the trial to recoup damages on account of this alleged failure of the reservoir, as against the claim of defendant in error.

Much evidence was taken in regard to this matter, which we do not deem it necessary to discuss in detail. All of it went to the jury and was no doubt duly considered by them. We see no reason for holding that the verdict was not warranted by the evidence.

Complaint is made of the instructions as a whole, but the only one to which specific objection is made is the first of the series, which we have already discussed.

On the whole we think the instructions were substantially free from any just criticism; that the case was fairly tried, and no good reason is perceived why the judgment should be reversed. It will therefore be affirmed.

MR. JUSTICE DIBELL took no part.

**Mrs. E. F. Bamberger v. John H. Golden.**

1. **APPEALS—By Joint Defendants.**—Where two defendants join in praying an appeal, which is allowed on condition that they enter into an appeal bond in a given sum within a certain time, one alone can not perfect the appeal.

2. **SAME—Separate Appeals.**—If a party desires a separate appeal he must pray for it and obtain an order accordingly.

3. **TRIALS BY THE COURT—Questions of Fact.**—Where questions of fact are involved in a controversy the same importance should be attached to the findings of the trial court as to the verdict of a jury.

**Forcible Detainer.**—Appeal from the Circuit Court of Woodford County; the Hon. JOHN H. MOFFETT, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

ISAAC J. LEVINSON, JOS. A. WEIL and W. L. ELLWOOD,  
attorneys for appellant.

QUINN & QUINN, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of forcible detainer, brought by appellee to recover the possession of property situated in the city of Minonk, known as Dasher Hotel.

The suit was originally commenced against appellant and her husband, A. Bamberger. On a trial before the justice of the peace and a jury both defendants were found guilty and appealed to the Circuit Court, where the case was tried *de novo*, resulting in a disagreement of the jury. At a subsequent term of court a jury was waived and the cause tried by the court; both defendants were found guilty and judgment rendered accordingly, from which judgment both defendants prayed an appeal to this court. Appellant E. F. Bamberger alone perfected an appeal.

Had a motion been made to dismiss the appeal, we should have felt it our duty to sustain it under the authority of *Hileman v. Beale*, 115 Ill. 355.

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Bamberger v. Golden.

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It is the well settled law of this State that where two defendants join in praying an appeal, which is allowed on condition that they enter into an appeal bond in a given sum within a certain time, one alone can not perfect an appeal. If a party desires a separate appeal he must pray for it and obtain an order accordingly. But in this case, as both parties have submitted the case on its merits, we have so considered it, regardless of the informality of the appeal.

It appears from the evidence that on June 2, 1892, the then owner of the property in controversy, William P. Dasher, executed a lease of the premises to appellant, for a term of five years, from July 1, 1892, to July 1, 1897. Appellant and her husband, A. Bamberger, went into the possession of the premises in the latter part of June, 1892. Subsequently appellee purchased the property, and appellant attorned to him as landlord during the remainder of the term of five years. The controversy between the parties arises as to the conditions or agreement, or lack of agreement, upon which appellant continued to hold the premises after the expiration of the five-year lease.

There is no dispute that appellant and her husband tried to obtain a new lease of the property, but there is a serious conflict in the evidence as to what was agreed upon between the parties. Appellant's testimony is that appellee agreed to let her have the occupancy of the hotel property for one year from July 1, 1897. Appellee denies this and insists he only agreed to allow appellant and her husband to retain the possession of the property from month to month, and that he would give them a ninety-day notice to quit in case he wanted the possession.

Appellant remained in the possession of the hotel for two months after the expiration of the five-year lease, and appellee then served upon the defendants a notice dated August 25, 1897, notifying them to deliver up possession on December 1, 1897. There is a conflict in the evidence as to when this notice was served, appellee swearing it was served by him on August 25, 1897, and appellant's husband testifying that it was not served until September 9th following. As to the questions of fact involved, the same

importance should be attached to the findings of the trial court as to the verdict of a jury, inasmuch as it heard and saw the witnesses, and was in a better position to judge of their credibility than we can possibly be. While the questions of fact were close, upon the evidence, we can not say the trial court came to a wrong conclusion.

It is quite clear from the evidence that appellee refused to make a new lease, and if the tenancy was not one from month to month, as sworn to by appellee, then we think the notice to deliver up possession was sufficient, even if the minds of the parties never met upon any certain or definite agreement.

Appellant's position is that by holding over and paying rent, a tenancy from year to year was created, and that the notice was therefore insufficient. We think under the evidence this position is untenable. The notice given was not to quit, but to surrender possession on December 1, 1897, in accordance with the ninety-day agreement sworn to by appellee, under which appellant had a right to occupy all of November 30th.

The judgment of the court below was, against both defendants, and that is assigned for error. So far as A. Bamberger is concerned, by his failure to join in the appeal, he had no right to join in appellant's assignments of error and he has no right to have them considered. For the same reason appellant can not complain of any wrong done to her husband by the judgment, even if it were done, which we are not called upon to decide.

On the whole we are of the opinion that the judgment was right, and it will be affirmed.

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### William Gehm v. The People, etc.

87	158
102	*208

87	158
107	528

1. **SETTLEMENT—Unaccepted Offer.**—A mere unaccepted offer to pay a sum in compromise of a suit or claim is not admissible in evidence against a party, on grounds of public policy, and this rule is applicable to bastardy suits.

2. **BASTARDY PROCEEDING—A Civil Suit.**—A proceeding in bastardy

Gehm v. The People.

is a civil suit, and a preponderance of evidence in favor of the complainant is sufficient to support a verdict.

3. INSTRUCTIONS—*Preponderance of the Evidence*.—It is improper to instruct a jury in an argumentative manner as to the weight to be given to the testimony of witnesses: the jury themselves may see reasons to believe one and disbelieve another.

**Bastardy**.—Appeal from the County Court of Bureau County; the Hon. R. M. SKINNER, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.

HASKINS & PANNECK, attorneys for appellant.

ALFRED R. GREENWOOD and WATTS A. JOHNSON, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was a bastardy proceeding, in which defendant was charged with being the father of the illegitimate child of Mrs. Kate Ford. On a jury trial defendant was convicted, and the usual order against him was entered, and he appeals therefrom. We have concluded a new trial should be awarded for two reasons.

1. Upon the trial the prosecutor was permitted to prove by Charles Noe that he asked defendant if the case could not be settled, and that defendant replied he had offered Wymer, father of Mrs. Ford, \$350, and he would not take it. This evidence was objected to as soon as it appeared the conversation related to an effort at a settlement, and before the statement had been made by the witness, and the objection was overruled and defendant excepted. After the testimony had been given defendant asked to have it excluded, and this was denied, and defendant excepted. There was nothing in the statement of defendant so testified to, tending to admit that the charge against him was true, or that he was the father of Mrs. Ford's child, or that he had ever had intercourse with her. A mere unaccepted offer to pay a sum in compromise of a suit or claim is not admissible in evidence against a party, on grounds of

public policy. An innocent party has a right to buy his peace and thus avoid suit. If such offer could afterward be given in evidence against the party making it, and used as a tacit admission of liability, no attempt to compromise a suit would ever be made. (1 Greenleaf on Evidence, Section 192; *Rockafellow v. Newcomb*, 57 Ill. 186; *Paulin v. Howser*, 63 Ill. 312; *Barker v. Bushnell*, 75 Ill. 220; *Rollins v. Duffy*, 18 Ill. App. 398; *McKinzie v. Stretch*, 53 Ill. App. 184; *Harrison v. Trickett*, 57 Ill. App. 515.) Lord Mansfield thus stated the rule:

"It must be permitted to all men to buy their peace without prejudice to them should the offer not succeed, such offers being made to stop litigation, without regard to whether anything is due or not. That no advantage shall be taken of offers made by way of compromise, that a party may with impunity attempt to buy his peace, are well established rules of law." (1 Rice on Evidence, Sec. 243.)

This rule is as applicable to a bastardy suit as to any other. (*Miene v. People*, 37 Ill. App. 589.)

A public trial of a charge of this kind may seriously affect the standing in the community even of one who is innocent, and a rule ought not to be established which would in effect prevent the withdrawal of the charge by compromise. In view of the fact that the supposed statement by defendant did not contain an admission of guilt, or of any incriminating fact, we are of opinion it was error to admit the evidence and error to refuse the motion to exclude it after it had been received. The ruling of the court made it necessary for defendant to go into proof of said conversation with Noe. Defendant's version of the conversation made him not a participant in the offer to compromise. But the jury may have concluded that as defendant was interested and Noe was not, greater credence should be given the testimony of the latter; and as the court had ruled the testimony competent, the jury would naturally conclude that the offer to compromise was considered by the court as a circumstance tending to show defendant was the father of Mrs. Ford's child, if not indeed a direct admission thereof.



2. This is a civil suit, and a mere preponderance of evidence in favor of the people is sufficient to support a verdict against defendant. Mrs. Ford testified that in the evening of April 10, 1898, in her bedroom, in the house where both parties lived as servants, defendant had intercourse with her, and that he was the father of her child, born January 4, 1899. Defendant testified he did not visit her room the evening of April 10, 1898, and that he never had intercourse with her at that or any other time. We are unable to find anything in the evidence which seriously tends to corroborate Mrs. Ford upon the main question, whether he did visit her room and have intercourse with her, except the incompetent proof of an offer to compromise. Defendant relies upon *McFarland v. People*, 72 Ill. 368, where, in a bastardy case, it was held to be error to refuse to instruct the jury that if the mother swears defendant is the father, and defendant swears he is not, then if they are of equal credibility, the one offsets the other, and unless further evidence or circumstances proved give the preponderance for plaintiff, defendant should be acquitted. But this was overruled in *Johnson v. People*, 140 Ill. 350. Undoubtedly it is improper to instruct the jury in this argumentative manner as to the weight to be given to the testimony of witnesses. It is also true the jury may see reasons to believe the one and disbelieve the other which can not be incorporated in the record sent to this court. Yet the question whether the evidence is sufficient to support the verdict is open to determination in this court; and while we must give due weight to the superior facilities possessed by the jury for determining the truth by seeing the manner of the witnesses upon the stand, yet that consideration is not conclusive upon us that their verdict is just. We find no competent evidence in this record casting any doubt on the defendant as a witness. On the other hand not only were there several features of Mrs. Ford's testimony which were very improbable, but her evidence is placed under serious cloud by the fact, which appeared upon her cross-examination, that she was indicted with her husband and others for the murder of Edward

Moore at Allen's Park, Ottawa, in 1890; that she pleaded guilty and was sentenced to imprisonment in the penitentiary for a term of fourteen years, and served five years and seven months of that sentence, and was then pardoned. Finding that the prosecuting witness has been a married woman, and is an ex-convict, and that her evidence is uncorroborated upon the main fact, and is in several respects improbable, and that she had the burden of proof, while against her is the positive denial of the defendant, who stands unimpeached, we are of opinion this case ought to be submitted to another jury.

The judgment is reversed and the cause remanded.

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**Wm. A. McCune, Assignee, etc., v. Hartman Steel Co.  
et al.**

1. **VOLUNTARY ASSIGNMENTS—*Expense of Erroneous Appeal.***—Where an assignee takes an appeal to the wrong court, and persists in such appeal after being advised that he is wrong, and the appeal is taken for his benefit, the expenses of the mistake should be borne by him.

2. **SAME—*Assignee Entitled to Professional Advice and Assistance.***—An assignee is entitled to professional advice and assistance in drawing his report in matters of importance, as well as a reasonable allowance for an attorney at the hearing of objections.

3. **SAME—*Liability of Assignee for Rents Not Collected.***—An assignee should be charged with the difference between the amount of rents due his assignor and the amount he should have collected.

4. **SAME—*When Chargeable with Interest.***—An assignee is to be charged with legal interest on amounts found due in his hands for distribution from the time they should have been distributed.

5. **PRACTICE—*Motion to Strike Objections by Non-resident Creditors from the Files.***—Before a motion to strike objections of non-resident creditors from the files for the want of security for costs can be entertained, it must be shown, by affidavit or otherwise, that at the time the objections were filed the objectors were non residents of the State of Illinois.

**Proceedings Under the Assignment Act.**—Appeal from the County Court of Whiteside County; the Hon. H. C. WARD, Judge, presiding. Heard in this court at the October term, 1899. Affirmed in part, reversed in part, and remanded with directions. Opinion filed February 1, 1900.

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McCune v. Hartman Steel Co.

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C. L. SHELDON, attorney for appellant.

J. E. McPHERRAN, attorney for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

In 1884 the Novelty Manufacturing Company, located at Sterling, Illinois, having become insolvent, made an assignment to William A. McCune, the appellant, for the benefit of its creditors.

Appellant qualified as such assignee, took charge of the assets of the insolvent corporation and proceeded to dispose of its property and convert the same into money. On October 21, 1895, appellant filed his report as assignee, showing a balance in his hands, asking for an order to distribute the same, and that when said distribution should be made he be discharged. Certain of the creditors, including the Hartman Steel Company, filed objections to the report, some of which were sustained by the court, and the assignee was ordered to restate his account and file an amended report. From this order an appeal was taken by the assignee to the Circuit Court, which, upon motion by the creditors, dismissed the appeal on the ground that it should have been taken directly to the Appellate Court. From the order of the Circuit Court dismissing the appeal the assignee appealed to the Appellate Court, where the judgment of the Circuit Court was affirmed, and thence to the Supreme Court, where the judgment was again affirmed. *William A. McCune, Assignee, v. The American Screw Co. et al.*, 70 Ill. App. 631, and 170 Ill. 622.

On October 24, 1898, the remanding order having been filed in the County Court, it was ordered that the assignee make and file his report and exhibit all claims filed with him, and in compliance with such order, on November 14th following, he filed his amended final report. The Hartman Steel Company and other creditors filed twenty-five objections to said report. They were heard upon proofs and most of them were overruled. The court, however, sustained certain of the objections and restated the account

accordingly. The assignee excepted to the rulings of the court so far as the same were adverse to him, and by this appeal seeks a reversal of the same. Although the objections to the report were numerous, the matters contained therein, which are involved in this suit, are but four in number and will be considered in order.

First. The assignee had inventoried a certain number of pounds of wire on hand, of certain sizes, and in 1884 petitioned the County Court, stating W. A. Sanborn had offered a certain price per pound for it, and asking leave to sell it to him at that price. An order was thereupon entered by the court, authorizing the sale of the wire at the price stated. In his report the assignee charged himself with the sale of a less quantity of wire than that mentioned in the petition, at a slightly lower price. The County Court charged him with the full amount of wire inventoried and described in the petition, at the price therein named and fixed by the order, making a difference of \$601.10 against him. The proof shows the quantities for the inventory and petition were taken from invoices, and not from personal weighing by the assignee; that when he came to make up the wire for the purchaser he caused it to be weighed, and made a bill of its weight to the purchaser showing a less quantity; that wire is subject to some shrinkage in weight, by reason of waste in manufacture, and that the assignee in fact only sold and delivered the quantity with which he charged himself in the report. We think the assignee's bill to the purchaser, under all the circumstances shown by the evidence, better proof of what was actually sold and delivered to the purchaser than the mere recollection of Presbrey, the only witness who contradicted appellant on that subject, who, fourteen years ago, weighed part of it, and at the time saw figures made by others, not witnesses, who weighed the rest. We therefore hold that the assignee should only be charged with the quantity billed to the purchaser. But, the price being fixed by the order, he had no right to sell the wire for a less price, and he testified that he could not explain why he

did so. He should, therefore, be charged for the wire at the price named in the order.

Second. Prior to the assignment, the firm of Cavert & Mallory leased power from the Novelty Manufacturing Company at \$12 per month. After the assignment they continued to use the power until the assignee sold the property in September, 1885. The assignee collected from them only enough to pay the rent for four months during the entire time he had control of the power. He testified that they were unwilling and unable to pay more, but does not show any steps taken by him to compel payment or to sell the claim against them. It appeared from the evidence that Cavert & Mallory paid the rent, at the rate of \$12 a month, to the Novelty Manufacturing Company before the assignment, and that they paid promptly at the same rate to the party who purchased from the assignee. We therefore think it proper that the assignee should be charged with the difference between the amount he collected and the amount he should have received at \$12 per month, which is the sum of \$81.60.

Third. In his report the assignee took credit for \$350.80 for attorney's fees and expenses since his last report, which the court below rejected. Most of the items going to make up that amount are for attorneys' fees and printing briefs, abstracts and petition for rehearing in the case, taken by the assignee to the Circuit, Appellate and Supreme Courts above referred to. The assignee went to the wrong court with his appeal and persisted in it after being advised he was wrong. The appeal was taken for the benefit of the assignee and the expenses of the mistake should be borne by him. But \$115 of said sum is for professional advice for drawing his amended report and for counsel who assisted him at the hearing of the objections. As to nearly \$7,000 of the amount to which objections were filed, the assignee was sustained, and he was overruled only as to the sums above mentioned. We think he was entitled to professional advice and assistance in drawing his report in so important a matter and under the circumstances a reasonable allow-

ance for an attorney at the hearing of the objections. The attorney's fees to the amount of \$115 should have been allowed.

Fourth. The County Court, in reforming his account charged the assignee with interest on the amount found to be in his hands for distribution from April 14, 1890, at the rate of five per cent per annum. The evidence shows that appellant had or should have had in his hands, for that length of time, money belonging to the creditors, which should have been distributed, and he was therefore properly charged with the interest during the time which he detained it. We approve both the date from which the interest is charged and the rate. The amount upon which it is to be computed will need to be restated in the manner hereinbefore indicated.

After the hearing in this cause, but before the court had entered its order in the same, appellant entered a motion, supported by affidavit, to strike the objections of appellees from the files, on the ground that they were non-residents of the State of Illinois, and had not filed any security for costs as required by the statute. The denial of this motion by the court is assigned by appellant as error. The matters in controversy here had been substantially in litigation for some four years. Without passing on the question whether non-resident creditors are required to file security for costs under such circumstances, it is sufficient to say that it does not appear from the affidavit, or otherwise, that at the time the objections were filed, appellees were non-residents of the State of Illinois. That fact must be shown before motion to dismiss could be entertained. *Leadbeater v. Roth*, 25 Ill. 587; *Johnson v. Huber*, 34 Ill. App. 527.

The court committed no error in overruling the motion.

For the reasons above given, the order of the County Court in this case is affirmed in part and reversed in part, and remanded, with directions to restate the account of the assignee so as to conform to the views of this court as hereinbefore indicated.

Affirmed in part, reversed in part, and remanded, with directions.

Ransom v. City of Belvidere.

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**Frank Ransom v. City of Belvidere.**

1. CITIES AND VILLAGES—*Liability for Defective Sidewalks.*—A city can not be held liable without proof that it had notice of the dangerous condition of a sidewalk, or proof that the dangerous condition had existed for such a length of time that the city, in the exercise of reasonable care, should have known the fact.

2. SAME—*Constructive Notice.*—Municipalities can not be held for injuries resulting from defective sidewalks without proof of either actual or constructive notice.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Boone County; the Hon. CHARLES E. FULLER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

WILLIAM L. PIERCE and CHARLES ROACH, attorneys for appellant.

P. H. O'DONNELL, city attorney, and ROBERT W. WRIGHT, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case by appellant against appellee to recover damages for injuries alleged to have been sustained in consequence of a fall upon an icy sidewalk.

The declaration contained two counts. The first averred that the defendant was possessed and had control of a certain sidewalk in the city, and wrongfully and negligently suffered and permitted the same to be and remain in bad and unsafe repair and condition, with full notice thereof, for two months; that the defendant constructed a portion of the walk in a declivitous manner, and that snow and ice accumulated thereon and caused the same to become slippery and unsafe for travel thereon; that plaintiff, who was without notice of the condition thereof, stepped upon the icy and declining surface of the walk and fell therefrom, and was greatly injured.

The second count alleges the negligent construction of the walk, the accumulation of snow and ice thereon, its dangerous condition for persons using the same, notice to the city for one month, the due care of the plaintiff, as well as his fall and injury.

The defendant filed a plea of not guilty and the cause was tried by a jury. The defendant offered no evidence on the trial but permitted the case to go to the jury solely on the evidence introduced by the plaintiff. The jury returned a verdict of not guilty, and after overruling a motion for new trial the court entered judgment on the verdict, and the plaintiff brings the cause to this court by appeal.

The evidence shows that several months before the accident complained of, a building, known as Union Hall, had stood on the block abutting upon the walk in question, which was then a plank walk. The building having been destroyed by fire it was the expectation that the property would be rebuilt in a short time, and in preparation therefor the city council changed the grade of the street so that a new sidewalk, when laid, should be somewhat higher than the old one. A portion of the new walk had been laid at the time of appellant's fall and injury, being constructed of cement, permanently laid, and a foot or so higher than the old plank walk. To connect the new with the old walk, the city constructed a piece of wooden walk, made out of solid plank laid crosswise upon stringers to which the plank were spiked. This connecting piece of walk was about seven feet long and built upon an incline from the new and higher grade to the lower, the declivity being a slope to the north of from one and one-half inches to three and one-half inches to the foot, according to the varying testimony of appellant's own witnesses. In laying the plank the upper edge of each was raised, as counsel for appellant say, "about the thickness of a lath," so as to answer the purpose of cleats, which are not infrequently seen nailed on similar pieces of walk where a declivity exists. The walk in this condition had existed for several months before the accident.



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Ransom v. City of Belvidere.

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Appellant was a pharmacist, having his place of business on North State street, in said city, about two hundred feet from the place where he fell and was injured. He had passed over the walk at the place of the declivity several times before the accident. On the night of his injury appellant, in company with the witnesses Gorham and Greenlee, passed over this walk, and in doing so he slipped and fell, receiving the injury complained of.

The witnesses Gorham and Greenlee were entirely familiar with the condition of the walk, and as they approached the place of the declivity Gorham said: "Here would be the place to slide," but whether the remark was made before appellant fell, or about the time he fell, does not appear with certainty. Gorham and Greenlee passed over the walk in safety.

We can not see that any just complaint can be made as to the manner in which the walk was constructed. There can be no doubt as to the right of the city to change the grade of the sidewalk under the circumstances shown by the evidence in this case, provided it used reasonable care for the public safety while making the changes from a lower to a higher grade. It is not to be expected the permanent walks along an entire street can all be put in at the same time. Building operations create unavoidable delays, and it not infrequently happens that connections must be made between walks on lower and higher grades, as was done in this case. Where these connecting walks are built of plank upon a declivity, prudence would seem to dictate that cleats should be nailed or fastened across the walk, so as to afford protection against slipping in frosty and icy weather. The same end seems to have been attempted by constructing the walk in question, as we have already described. That snow or ice may accumulate along these cleats is true, but it would seem to be a matter of common sense that the walk would be less dangerous with, than without them. Had the walk in question been a straight declivity of seven feet, with a decline of fifteen inches without a break, it seems to us it would have been

more dangerous than it was, as constructed and existing at the time of the accident. The question as to whether or not the walk was dangerous in its construction was one of fact for the jury, and they having found it against appellant we see no reason for disturbing their verdict, so far as that point is concerned. Indeed we do not see how, upon the evidence, they could have reasonably found otherwise.

We fail to find any evidence in the record as to the length of time the ice and snow had existed upon the declined portion of the walk where appellant fell; nor do we find any evidence of notice to the city. It is unnecessary to cite authorities to the proposition that the city can not be held liable, without proof that it had notice of the dangerous condition of the walk, or proof that the dangerous condition had existed for such a length of time that the city, in the exercise of reasonable care, ought to have known the fact. In other words, there must be proof, either of actual or constructive notice. In this case we think such proofs are not to be found in the record.

We are of opinion, therefore, that the appellant did not prove a cause of action. Much complaint is made of the instructions. They are very voluminous, and cover every phase of the law applicable to this class of cases. Where so many instructions are presented to the trial court it would be almost a wonder if errors did not occasionally creep in. But in the view we take of the case we do not deem it necessary to discuss the instructions. Even if erroneous, as claimed, that would not reverse the judgment, for the reason above given, that the plaintiff on his own showing did not prove a cause of action against the defendant city. The judgment will therefore be affirmed.

**Commercial National Bank v. John Waggeman, Sophronia Waggeman and Wilhelmina Harre.**

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1878 227  
87 171  
d98 616

1. **PROMISSORY NOTES—*Forged Indorsements.***—A forged indorsement on a promissory note passes no title.

**Mortgage Foreclosure.**—Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

JACK & TICHENOR, attorneys for appellant.

JOSEPH A. WEIL and STEVENS & HORTON, attorneys for appellees.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was a bill in equity, filed by appellant against appellees, for the purpose of foreclosing a mortgage executed by John Waggeman and wife, Sophronia Waggeman, two of the appellees herein, to Wilhelmina Harre, their co-appellee. The mortgage was dated October 25, 1886, to secure a certain note for \$3,500, executed by John Waggeman to Wilhelmina Harre, and payable to her order three years after date, with interest at the rate of seven per cent per annum, payable annually. It appeared from the evidence that on or about November 22, 1897, Henry E. Potthoff, a son-in-law of Wilhelmina Harre, having borrowed from appellant bank \$3,500, executed to it his three notes aggregating that amount, and for the purpose of securing the payment thereof, pledged to appellant the Waggeman note and mortgage, the note purporting to be indorsed and assigned by said Wilhelmina Harre.

Potthoff having failed to pay his notes, this bill was filed by appellant to foreclose the Waggeman mortgage. The Waggemans and Mrs. Harre were made defendants to the bill and filed their respective answers thereto. That of

Mrs. Harre denies the right of Potthoff to pledge the securities described in the bill, and alleges that if he did so it was wholly without authority; that she left the note and mortgage with Potthoff for safe keeping merely, and that she never indorsed the same or transferred the title in any way; that said Potthoff was acting merely as custodian for her and was at no time entitled to the possession of the note and mortgage in any other capacity, and had no right to transfer the same; alleges that she is still the lawful and rightful owner thereof, and the only person authorized to commence foreclosure proceedings thereon.

The answer of John and Sophronia Waggeman make the same denials as to the right of Potthoff to pledge the securities and as to his title thereto; admits the execution and delivery of the note and mortgage to Mrs. Harre, but denies that complainant is entitled to the possession or control thereof, or that it has any right to a foreclosure of the same.

Appellee Harre filed a cross-bill setting up the same facts alleged in her answer, and praying that a decree be entered declaring the title to the note and mortgage to be in her, and directing the complainant in the original bill to turn the same over to her, and that the original bill be dismissed at the costs of the complainant therein.

The cause, being at issue, was referred to the master to take proofs, and report the same, with his findings thereon. Proofs were taken, and the master found from the evidence, and so reported to the court, that Potthoff pledged the Waggeman note and mortgage to appellant to secure his own indebtedness to it; that said note at the time it was so pledged, apparently bore the indorsement of Mrs. Harre in blank on the back thereof, but that she did not indorse the note or authorize any one else to do so for her, and had no knowledge of such indorsement until after the same had been pledged and delivered to appellant by Potthoff; that the indorsement upon the back of the note is a forgery; that Mrs. Harre never parted with the title to the note, but is still the owner thereof and entitled to the possession of the same; and the master recommended a

## Backhaus v. The People.

decree accordingly. Appellant filed objections before the master, and renewed them as exceptions in the Circuit Court. The cause being heard on these exceptions they were overruled, a decree entered in accordance with the findings of the master, and the complainant prosecutes this appeal.

The only question for our consideration is one of fact. Did Mrs. Harre make the indorsement upon the note in controversy or was her alleged signature upon the back thereof a forgery?

The original note, and several other papers containing signatures of Wilhelmina Harre, which were in evidence in the court below, and which it is admitted were written by her, have been certified to us for inspection and comparison, and after a careful examination of them, and the evidence bearing upon the question, we see no reason for disagreeing with the master, or holding that the court below was in error in finding that the signature in question was a forgery.

It would serve no useful purpose to discuss the evidence in detail and we shall not attempt it. Taken as a whole it satisfies us the finding of the court was right. If Mrs. Harre simply left the note and mortgage with Potthoff for safe keeping, as she claims, and never gave him authority to pledge the same or to write her indorsement thereon, it follows that appellant obtained no title thereto. Mrs. Harre could not be bound by the statements of Potthoff made without her authority, knowledge or consent.

We think the decree was right and must be affirmed.

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### Henry Backhaus v. The People, etc.

1. **DRAM-SHOP LICENSE—*Must be Authorized by Law.***—A license issued contrary to law is a nullity, and affords no protection to persons acting under it.

2. **SAME—*Where the Licensee Must Act at His Peril.***—Where the statute makes it criminal to conduct, without a license, a business

which is subject to police regulations, a person carrying on such business may be required to act at his peril with reference to the validity of such a license.

8. *SAME—Power of Municipalities to Fix the Fees.*—A city can not determine the amount of a license fee and the manner of payment by resolution; it must be done by ordinance.

4. *SAME—Requisites of Ordinances Authorizing.*—Without the adoption of a general ordinance on the subject authorizing the issuing of licenses, specifying who shall issue them, the length of time they shall run, the amount to be paid by the applicant, and the time and manner of payment, etc., municipal authorities are powerless to issue such licenses.

5. *SAME—Payments in Advance.*—Municipal authorities can not issue a valid license to keep a dram-shop unless the amount to be paid therefor is paid in advance for the entire period covered by the license, not less than at the rate of five hundred dollars per year.

6. *ORDINANCES—Repeals and Amendments.*—An ordinance of a city can be repealed or amended only by an ordinance. A mere resolution or order, not passed and published as an ordinance of the city, will not constitute a repeal of an ordinance duly passed.

7. *CRIMINAL LAW—Absence of Guilty Intent.*—The absence of guilty intent is no defense in a prosecution for a violation of the dram-shop act.

*Information.*—For a violation of the dram-shop act. Error to the County Court of Kankakee County; the Hon. E. B. GOWER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

CHARLES B. CAMPBELL, attorney for plaintiff in error.

BERT L. COOPER, State's Attorney, for defendant in error.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a proceeding in the County Court, by information against plaintiff in error, charging him with violating the dram-shop act.

The information contained thirteen counts, eleven of which charged him with selling, and two with giving away, intoxicating liquors in less quantity than one gallon, "not having a legal license to keep a dram-shop." Upon the trial the people introduced evidence showing that plaintiff in error was a saloon keeper, doing business in the village of Grant Park, in Kankakee county, and that he had made several sales of intoxicating liquor between May 2, 1898, and

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February 21, 1899, when the information was filed. In defense, plaintiff in error offered in evidence a license to keep a dram-shop, issued to him by the village of Grant Park on May 2, 1898, for the period of one year. Its admission was objected to on behalf of the people, on the ground that no preliminary proof had been made of an ordinance of said village authorizing the licensing of dram-shops, and the objection was sustained by the court. Plaintiff in error then offered a portion of the journal of the president and board of trustees of said village showing a resolution adopted April 30, 1898, fixing the license fee for dram-shops at \$500 per year, payable in two installments, and directing a license to be issued to him. The people objected to the admission of the resolution, for want of authority on the part of the president and board of trustees to pass the same, and this objection was also sustained by the court. Plaintiff in error then offered in evidence an ordinance of said village, relating to the licensing of dram-shops. This was objected to on the ground that it was invalid, because it did not provide for the manner of issuing license, or the amount, time, manner or place of payment of license fee; was contrary to the statute and did not authorize the issuing of license; and the court again sustained the objection.

Plaintiff in error when on the witness stand did not deny the sales testified to, but was asked by his counsel whether or not he honestly believed that during the time in question he was complying with all the liquor laws of the State. This question was objected to and the objection sustained by the court. The ruling of the court upon each objection was duly excepted to by plaintiff in error. The jury returned a verdict of guilty upon two counts of the information. A motion for a new trial was overruled by the court, and judgment entered upon the verdict.

The dram-shop ordinance of the village offered in evidence was passed in 1885, and provided that the president and board of trustees might "authorize by resolution any person, or persons not constituting a corporation, to sell and give away, within the corporate limits of said village, all or

any of the liquors mentioned in the first section of this ordinance, and direct that a license signed by the president and attested by the village clerk, under the seal of said village clerk, issue by said clerk to such person or persons, upon him, her or them paying into the village treasury, in installments or otherwise, a sum of money of an amount to be fixed in such resolution by the president and board of trustees." Under the authority claimed to be given to them by this ordinance, the president and board of trustees adopted the resolution of April 30, 1898, directing a license to be issued to plaintiff in error, and fixing the license fee at \$500 per annum, payable "in two installments, as follows: \$300 on May 1, and \$200 on November 1."

It is contended by plaintiff in error that his license, being regular in form, is a complete protection to him, and that its validity can not be questioned in a proceeding of this kind. We do not think this position well taken. It was held in *Spake v. The People*, 89 Ill. 617, that a license issued contrary to law is a nullity. If the license by which plaintiff in error seeks to shield himself was a nullity by reason of having been granted contrary to law, it could not afford him any protection. *City of Eureka v. Davis*, 21 Kan. 578; *Russell v. State*, 77 Ala. 89; *State v. Moore*, 1 Jones (N. C.), 276; *Moore's Criminal Law*, Sec. 281.

Our statute makes it a misdemeanor, punishable with fine or imprisonment, for any one to sell intoxicating liquor in less quantity than a gallon without a license.

"Where the statute makes it criminal to conduct, without a license, a business which is subject to police regulations, a person carrying on such business may be required to act at his peril with reference to the validity of such a license." *McLain's Cr. Law*, Sec. 128.

We are therefore of opinion that the legality of the license offered in evidence by plaintiff in error could properly be inquired into in this cause, and that the County Court committed no error in refusing to admit it without preliminary proof of an ordinance authorizing it to be issued.

The question therefore arises, was there a legal ordinance authorizing the issuing of such a license? An ordinance



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authorizing the issuing of a license for the sale of intoxicating liquor must comply with the general laws of the State relative to the granting of licenses. Starr & Curtis' Stat., Chap. 24, Sec. 63, Subdiv. 46.

The section of the statute above referred to provides that cities and villages shall have the power "to license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license." The ordinance in question did not determine the amount to be paid for licenses under it or the manner in which the same should be paid, but provided that any person authorized by resolution of the president and board of trustees might obtain a license by paying into the village treasury, "in installments or otherwise, a sum of money of an amount to be fixed in such resolution." There was an attempt to supplement this ordinance by the resolution of April 30, 1898, fixing the license fee and providing for its payment in installments. If this resolution is to be considered as independent of the ordinance, it was unauthorized by law. In the case of *The People v. Crotty*, 93 Ill. 180, where the village authorities sought to fix the amount of license and the time of payment by resolution, without any ordinance on the subject, it was said by the court that "without the adoption of a general ordinance on the subject authorizing the issuing of licenses and specifying who shall issue them, the length of time they shall run, the amount to be paid by the applicant, the time and manner of payment, etc., the village authorities are powerless to issue a license to any one. \* \* \* It will hardly be seriously claimed that the two resolutions passed by the village authorities \* \* \* can be regarded as ordinances authorizing the issuing of licenses." Nor can the resolution be made effective by regarding it as a supplement or amendment of the ordinance.

In the case of *Hibbard et al. v. Chicago*, 173 Ill. 91, it was said by the court that "an ordinance of the city can

only be repealed or amended by an ordinance of the city. A mere resolution or order by the city council, not passed and published as an ordinance of the city, would not constitute a repeal of an ordinance duly passed."

We are of opinion that a city can not determine the amount of a license fee and the manner of payment by resolution, but that the same must be done by ordinance. See *People ex rel. Conlon v. Mount*, in which an opinion was filed at the present term of this court. But apart from the question of the right of the village to supplement the ordinance by a resolution, the ordinance and resolution in question here must be held invalid, for the reason that they do not provide for the payment of the entire license fee in advance.

The statute provides "that hereafter it shall not be lawful for the corporate authorities of \* \* \* any village in this State to grant a license for the keeping of a dram-shop, except upon the payment in advance into the treasury of the \* \* \* village granting the license, such sum as may be determined by the respective authorities of such \* \* \* village, not less than at the rate of \$500 per annum." *Starr & Curtis' Stat.*, Chap. 43, Sec. 16.

In *Handy v. People*, 29 Ill. App. 99, in passing upon this statute, it was said, "the proper authorities can not issue a valid license to keep a dram-shop unless the amount to be paid therefor be paid in advance for the entire period covered by the license, not less than at the rate of five hundred dollars per year." The resolution in question here provided for the payment of \$300 when the license was issued, and \$200 six months later. This was directly contrary to the provisions of the law in regard to the terms of payment, and would have been invalid for that reason if otherwise unobjectionable.

It is contended, however, by plaintiff in error, that even if the ordinance is invalid, and the license and order granting it void, they were admissible in evidence to show good faith and the absence of criminal intent on his part.

The statute provides that "whoever, not having a license

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to keep a dram-shop, shall \* \* \* sell any intoxicating liquor in any less quantity than one gallon \* \* \* shall be fined," etc.

This provision of the statute is without limitation, and under it our courts have frequently held that it was not necessary either to aver or prove a guilty intent. *McCutcheon v. The People*, 69 Ill. 601; *Farmer v. The People*, 77 Ill. 322; *Noecker v. The People*, 91 Ill. 494.

Absence of guilty intent is consequently no defense in a suit of this kind. There was therefore no error on the ground claimed in excluding the ordinance. For the same reason the court properly refused to permit plaintiff in error to testify as to whether at the time in question he honestly believed he was complying with the liquor laws of the State.

We find no error in the record, and the judgment of the court below is therefore affirmed.

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**William Silk v. The People, etc.**

1. **INTOXICATING LIQUORS—Unlawful Sales—Licenses, etc.**—The decision in the case of *Backhaus v. The People* (*ante*, page 178) must control here.

**Information.**—For selling intoxicating liquors. Error to the County Court of Kankakee County; the Hon. E. B. GOWER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

CHAS. B. CAMPBELL, attorney for plaintiff in error.

BERT L. COOPER, State's Attorney, for defendant in error.

**OPINION PER CURIAM.**

This was an information filed by the State's attorney against plaintiff in error, charging him with selling intoxicating liquors in less quantity than one gallon without a license, as provided by the law, in the village of Grant Park, in Kankakee county.

The license under which plaintiff in error claimed the right to make the sales was issued at the same time and under the same ordinance as that under consideration in the case of Backhaus v. The People (*ante*), in which we file an opinion at this term, and the two cases are similar in all essential particulars.

The decision reached in that case must therefore control in this, and the judgment of the court below is accordingly affirmed.

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### Coal Valley Mining Co. v. John Nelson.

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1. VERDICTS—*Unsupported by Evidence*.—Where the evidence fails to support the material averments of the declaration a judgment founded upon the verdict will be reversed.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.

HENRY CURTIS and JACKSON & HURST, attorneys for appellant.

W. R. MOORE, attorney for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case by appellee against appellant, to recover damages for personal injuries alleged to have been sustained in consequence of the fall of a rock in the roof of the mine in which appellee was working for appellant. There was a trial by jury, resulting in a verdict and judgment in favor of appellee for \$1,500 damages. A motion for new trial having been overruled, the defendant prosecutes this appeal.

The charges of negligence contained in the declaration are, in substance, that appellee was ordered by one Liedtke

to assist in the dangerous work of wedging down certain overhanging rock in the roof of the mine; that Liedtke was a boss or superintendent having charge and control of appellee and other workmen in the mine; that the work was dangerous and of a character with which appellee was not acquainted; that the alleged boss knew the danger and appellee did not, and that the boss did not inform appellee of the danger. That relying upon the supervision and knowledge of the boss he obeyed the order to assist in doing the work, and while doing so, the rock fell upon him and he was seriously injured. An additional count charged that it was the duty of appellant to furnish necessary machinery and appliances, and that while engaged in removing the rock, he, appellee, "had to climb to and stand upon a car, as he was so wrongfully and negligently ordered and required to do by said defendant." That for want of necessary appliances, and being wrongfully ordered by Liedtke to get upon the car, and because of Liedtke's failure to inform plaintiff of the danger of getting on the car, he, plaintiff, while removing the rock, exercising due care, the rock fell upon and injured him.

The cause appears to have been tried by appellee upon the theory of this additional count.

It is conceded that appellant operated the mine in which appellee was injured while in its employment.

The usual work of appellee in the mine was what is known as a "bottom digger," but it appears that he occasionally performed other work when required. It seems that after the miners dig out the coal, where the vein is thin, the bottom diggers follow and blast up the ground which underlies the strata of coal, so as to lower it sufficiently for the laying of a track upon which to transport the coal out of the mine upon cars drawn by mules, for the reason that unless the floor is lowered there is not room for a mule and man to travel in and out of the mine. Appellee had been working in this mine some eight months, mostly at bottom digging, but not entirely, as it appears from the evidence that when rock fell from the roof of the mine he

would be called to help clean it up, and occasionally, when there was loose rock overhead, he would be required to help pick it off.

On the part of appellee it is claimed that on the morning of the accident Liedtke, who was a tracklayer in the mine, directed appellee to go with him, Liedtke, to take down a rock in the roof in a part of the mine different from that in which appellee was at work, and that in compliance with such direction or order, appellee went with Liedtke to the place where the rock was to be taken down. Upon arriving there, two other men, Gus Thor and Gus Lage, were present to assist in the work. The two men last named were at one end of the rock, while appellee and Liedtke were at the other end, twenty feet away. At the end where appellee and Liedtke were, the roof was from eight to nine feet high, and they found it necessary to have something to stand upon in order to prosecute their work. Liedtke brought up one of the small coal cars which stood a short distance away, and appellee claims he was ordered by Liedtke to stand upon the car and drive a wedge into the rock to bring it down. This appellee did, and while getting out of the car after driving in the wedge, the rock fell and struck him, causing the injuries complained of.

On the part of appellant it is insisted that Liedtke was not a boss or superintendent with power to order or direct other workmen in the mine. Inasmuch as appellee, in his declaration and in the trial of the case, relied largely upon the proposition that Liedtke was his boss, representing the common master, and in such capacity gave him improper orders, which resulted in the injury complained of, it is important to inquire whether this claim is supported by the evidence. When that is examined it is found that substantially all the testimony on that subject consists of the statements of Liedtke himself, which we think were improperly admitted in evidence over the objection of appellant. We fail to discover any evidence that appellee ever recognized Liedtke as a boss or superintendent, with power to represent it in the command or direction of its employees. His business

appears to have been that of a tracklayer, and no doubt he occasionally called on other servants in the mine to come and help him, but this did not make him a boss, in the sense that appellant would be bound by his acts, on the theory he was a superior servant, with power to represent it. Nor could he make himself a boss or superior servant by his own declarations, made in the absence of the officials of appellant who had authority to represent and speak for it. We think testimony of this character should not have been admitted. Eliminating that, the evidence falls far short of sustaining the allegations of the declaration in that regard.

In the view we have taken of the case, the only question for us to determine is whether the evidence is sufficient to sustain the verdict. Giving the evidence all the weight we deem it entitled to, we have arrived at the following conclusions :

1. The evidence fails to show that Liedtke was a boss or superintendent, with power or authority to command appellee.

2. The work in which appellee was engaged at the time of his injury was not foreign to that he was ordinarily called upon to perform, but was such as he had frequently done before, and was not outside the scope of his employment.

3. The accident was one incident to the service in which he was engaged and was not the result of any negligence on the part of appellant.

4. There is no evidence that appellant was negligent in failing to furnish necessary machinery and appliances. The roof of the mine was low, and, ordinarily, the men needed nothing to stand upon to reach it. Nothing appears in the record to show that mines of this character are ever equipped with appliances for standing upon when working rock down from the roof.

5. We are of the opinion that had appellee been in the exercise of ordinary care for his own safety, the injury would not have been received. The danger was obvious. Appellee appears to have been possessed of all his faculties,

and was not coerced into the position he occupied. He and his fellow-employees were at work at the rock to make it fall, and no reason is perceived why it was necessary to warn him that if he stood under it when it fell he was liable to get hurt. As a matter of common sense he must have known it without other information on the subject.

All the evidence as to a want of proper timbering to support the roof of the mine was improper and immaterial. Appellee and his fellow-servants were in the act of taking down the stone in the roof. Under such circumstances the roof could not have been supported by timber and, at the same time, have the work accomplished.

Our conclusion is that the verdict is not sustained by the evidence, and, for that reason, the judgment must be reversed.

We think appellant has no just cause of complaint as to the action of the court on the instructions. We find no errors in the modifications, and without the refused instructions, the jury was fairly and fully informed as to the law of the case.

But, for the reasons above given, the judgment will be reversed and the cause remanded.

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**Moffitt-West Drug Co. v. Owen J. Aldrich.**

1. PROPOSITION OF LAW—*Reversible Error*.—Slight errors in the propositions of law should not reverse the judgment.

Appeal from the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

E. P. WILLIAMS and J. D. WELSH, attorneys for appellant.

CARNEY, SHUMWAY & RICE, attorneys for appellee.



MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

As sheriff of Knox county, appellee levied upon a stock of goods under an execution against M. H. Johnston in favor of the Nuttall Company for the sum of \$1,000 damages, and costs of suit, which execution was issued out of the Circuit Court of said county. Appellant claiming to be the owner of said stock of goods as a purchaser from M. H. Johnston, sued out a writ of replevin and took the goods from the custody of the sheriff. There was a declaration in the usual form, to which the defendant pleaded *non cepit*, property in himself, and a third plea justifying under the execution against Johnston, and averring the property to be in the latter and not in the plaintiff. The cause was tried by a jury and the issues found for plaintiff, but a new trial being granted, a jury was waived, and the cause tried by the court, who found the issues for the defendant and rendered judgment against the plaintiff for a return of the property, and for one cent damages and the costs of suit. Plaintiff below prosecutes this appeal.

There is no question that at one time Johnston was the owner of the stock of goods in controversy as part of a drug business which, for a number of years, he carried on in the city of Galesburg. It is conceded he was the sole owner and in full possession of the goods, and the store in which he did business in his own name up to November, 1895. In that month, Johnston was indebted to appellant in about the sum of \$1,750. On November 16, 1895, an arrangement was made between appellant and Johnston, which the former claims and insists was an absolute and *bona fide* sale to it of the stock of goods and business of the drug store, but which Johnston swears was not a sale, but was merely a colorable transaction based upon a secret understanding that the store and business should be run in the name of appellant, by Johnston as agent, until said sum of \$1,750, owing by Johnston to appellant, was paid, and that then the store and stock should be returned to Johnston.

If this was the real understanding and agreement of the

parties, there can be no doubt the transaction was fraudulent and void as to other creditors. A large amount of evidence was taken upon both sides to sustain the different contentions of the parties, much of which is conflicting in its character, and we do not deem it necessary to discuss it in detail.

The judge who tried the cause had a better opportunity of judging as to the credibility of the witnesses than we have, and we are not prepared to say he came to a wrong conclusion upon the evidence.

There are certainly many circumstances appearing in the evidence which tend to corroborate Johnston, and which are entirely inconsistent with the idea of an absolute sale of the goods and business to appellant.

On the whole we are satisfied with the finding of the court on the question of fact involved in the trial.

The propositions of law submitted by appellant were argumentative and improper, and there was no error in refusing them.

The propositions of law held by the court for appellee are open to criticism and not free from error, but we think, on the facts, the finding and judgment were so clearly right, that slight errors in the propositions of law should not reverse the judgment, and it will therefore be affirmed.

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### William David, Jr., v. Hannah David.

1. *DIVORCE—Orders for Support of Children.*—An order requiring the defendant in a suit for divorce to pay to the complainant money for her and her children's support is not necessarily erroneous, because the court had not previously committed the custody of the children to the complainant.

2. *APPELLATE COURT PRACTICE—Dependence upon the Record.*—The Appellate Court must determine causes upon the record of the court below, and can not hear additional proof in court on appeal.

*Divorce.*—Appeal from the Circuit Court of Iroquois County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

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David v. David.

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C. H. PAYSON, NELLY B. KESSLER and C. N. SAUM, attorneys for appellant.

FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On April 27, 1899, Hannah M. David filed in the court below her bill for divorce against her husband, William David, Jr. An injunction was granted thereon, restraining him from disposing of his real and personal property. On May 23, 1899, upon the hearing of a motion to modify the injunction, it was agreed that the defendant assign to complainant a certain note for \$720, and deposit the same with the clerk of the court, to be held by him in escrow till the further order of the court, and that the defendant within twenty days pay complainant \$50 for her own use, and pay her solicitors \$50 upon their fees, and that such payment should not prejudice complainant's application for temporary maintenance and solicitor's fees at the next term of court; and thereupon the injunction was dissolved except so far as it restrained defendant from selling or encumbering the home farm of 160 acres. At the next term complainant petitioned the court to allow her temporary alimony and solicitor's fees, and the application was heard upon proofs submitted, and on June 27, 1899, the court ordered that defendant pay for the support of complainant and her children \$15 on the first, and \$15 on the fifteenth of each month thereafter, commencing July 1, 1899. This is an appeal from that order.

1. It is urged that this order is erroneous because the court had not committed the custody of the children to complainant, reliance being had on *Harding v. Harding*, 144 Ill. 588.

In that case the court, after an allowance of temporary alimony to the wife, had awarded a further sum of \$180 per month for the support of two minor daughters. It was there held that a father can not be deprived of his right of

custody of his children and of his right to maintain them at his home, except by an order of court. In that case no such order had been made, but the question of the custody of the children had been expressly reserved till the final hearing, and the allowance for the support of said daughters was reversed. In the case at bar the allowance is of a gross sum for the support of the wife and children, and would be good as an allowance to the wife in any event. In the Harding case just cited the order appealed from also required the husband to pay the wife \$900 for the support of herself and said daughters to that date, and that portion of the order was affirmed. But further the bill in this case prayed that defendant "may also be enjoined and restrained from interfering with your oratrix' custody of said children until the further order of this court," and the judge to whom said bill was presented entered an order directing that an injunction issue as prayed in said bill. This is regarded as sufficiently committing said children to the custody of complainant for the purposes of this case, although the clerk in issuing the writ omitted that part of the order.

2. Defendant undertook to show that he was able and willing to maintain said children at his own home, and offered to do so; and he insists that under such circumstances he ought not to be required to pay complainant for their support. The children in question are six daughters, ranging in age from thirteen months to fourteen years, and the younger ones, at least, obviously need the care of their mother. If the allegations of the bill are true, said daughters ought not to live with or be in the presence of their father. Until the hearing they should remain in the custody of their mother, unless a different showing is made from that contained in this record.

3. It is urged that the allowance is excessive. The record shows complainant has no property. Thirty dollars per month for the wife and six daughters is an allowance of less than fifteen cents per day for each person. The sworn bill shows (and the record nowhere contradicts it in this respect) that defendant owns a home farm of 160 acres, esti-

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mated to be worth \$8,700 over and above the incumbrance resting upon it; that he possesses another farm of 440 acres a few miles distant, under a contract for a deed, and estimated to be worth \$8,700 more than the amount remaining unpaid on the contract; that he owns two notes, one for \$720 and the other for \$2,960; that he has fifty-two cattle, twelve horses, thirty-five to forty hogs, a large amount of poultry, and the ordinary farming implements for such a farm; and that after deducting certain debts, set forth in his proofs, he is worth between \$18,000 and \$19,000, besides the cattle, horses, hogs, poultry and farming implements. It does not seem to us excessive to require the owner of that amount of property to furnish support for his wife and minor children to the extent of less than fifteen cents a day for each one.

4. It is urged the wife should be required to use the \$720 note. It is not shown that this note is due, and it is in the hands of the clerk subject to the order of the court, and when it becomes due defendant can apply to the court for any proper order concerning it.

5. The record shows that the wife has in her hands the contract for a deed of the 440 acres, and she testified that she held it subject to the order of the court. Defendant claims he could have sold this contract for a large sum of money, and that it was error to order him to pay alimony to his wife while she retained it. He did not ask the court to order it delivered to him, and can not complain that the court did not give him relief which he did not seek. Complainant has filed an affidavit here stating that on the day the order appealed from was entered her solicitors delivered said contract to the solicitors for defendant in open court, in the presence of the presiding judge. If so, that fact might well have been stated in the certificate of evidence. We must determine this cause upon the record of the court below, and can not hear additional proof in this court. If complainant still retains the contract the defendant can have any proper relief concerning it by applying to the court below.

For these reasons the order of the court below is affirmed.

**John M. Gentle and Thomas S. Gentle v. Margaret A. Stephens.**

1. **MONEY HAD AND RECEIVED**—*Scope of the Action for.*—The scope of the action for money had and received has been enlarged until it embraces a great variety of cases, and will lie whenever one person has received money which in justice belongs to another, and which in justice and right should be returned.

2. **WAIVER**—*Of Tort.*—Where the custodian of a bond wrongfully converts the same to his own use, the owner may waive tort, and charge the wrongdoer in assumpsit, on the common counts, as for money received.

**Assumpsit**, for money had and received. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

W. L. ELLWOOD, attorney for appellants.

T. N. GREEN, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

In 1895, one Louis A. Buchner and his father, C. J. Buchner, were doing a banking business at Deer Creek, Tazewell county, Illinois, under the name of the "Deer Creek Bank." Louis A. Buchner had charge of the bank as the managing partner.

In June or July, 1895, three school bonds for \$200 each, dated June 18, 1895, and numbered 2, 3 and 4, respectively, were received by the bank; No. 2 was owned by one Mary Stephens, No. 3 by Mary Stephens and appellee, and No. 4 by appellee alone. The bonds were made payable to said owners, respectively, or bearer. These bonds were permitted by the owners to remain in the bank, and were afterward used by the latter as collateral security for a debt it owed the Central National Bank of Peoria, Illinois. On January 1, 1896, appellant John M. Gentle bought a one-third interest in the Deer Creek Bank, and in March, 1897, he purchased

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all the remaining interest in the same, and thereafter conducted it alone. It is not certain where the bonds were at the time Gentle purchased the bank, as Louis A. Buchner testified that at the time of such purchase the bonds were in the Deer Creek Bank, while John M. Gentle swore they were at that time in said Central National Bank. Immediately after he became the owner of the Deer Creek Bank, John M. Gentle borrowed \$1,500 of the Merchants National Bank of Peoria, for which he gave his note, with appellant Thomas S. Gentle as surety. There were also deposited with the Merchants National Bank, as collateral security for said \$1,500 note, certain notes taken by the Deer Creek Bank and said school bonds. About April 6, 1897, the Deer Creek Bank collected from the school district the principal of bond No. 2 and the interest on bonds Nos. 3 and 4. John M. Gentle thereupon obtained bond No. 2 from the Merchants National Bank and paid it off, and also paid the interest on bonds Nos. 3 and 4. On June 9, 1897, the Deer Creek Bank failed and John M. Gentle at once conveyed to T. S. Gentle certain real estate, and also made a bill of sale of the bank furniture and fixtures, and certain other personal property, to the latter, to further secure him as surety upon said \$1,500 note. Soon after the failure of the Deer Creek Bank, the Merchants National Bank turned over the \$1,500 note, together with the collateral deposited with it, to its attorney for collection. Along with the collateral were said school bonds Nos. 3 and 4. On June 24, 1897, Louis A. Buchner entered into an agreement with appellants, T. S. and John M. Gentle, by which said appellants undertook to convey to him certain real estate and to turn over to him certain notes and other personal property, including "school bonds of \$400," and in consideration thereof Buchner assumed and agreed to pay the liabilities and indebtedness of the bank, amounting to \$15,466.14. In the schedule of indebtedness, the note to the Merchants National Bank was listed at \$1,150, the other \$350 being specially excepted from the schedule by the agreement, and afterward paid by Thomas S. Gentle.

The bonds in question were subsequently turned over by the attorney of the Merchants National Bank, under the direction of appellants, to Louis A. Buchner, who sold them to the Eureka State Bank, which received payment of the same from the school district. This was a suit in assumpsit by appellee to recover the amount of bond No. 4, and also the interest due her on that bond and bond No. 3. The declaration consisted of the common counts only, but in the copy of the account sued on, the item for money had and received was stated as follows :

"To money had and received, to and for the use of said plaintiff, from conversion of school district bond of \$200, and interest \* \* \* \$400."

The two appellants pleaded the general issue and also by separate pleas, denied their joint liability. A jury was waived and on a trial by the court, judgment was entered against the appellants for \$200.

It appears from the proofs that the said bonds were held by the Merchants National Bank as collateral security for the \$1,500 note; that upon the failure of the Deer Creek Bank, the bonds were turned over to the attorney of the first named bank with the note, and that by the authority and direction of John M. Gentle and Thomas S. Gentle, they, with the other papers and property mentioned in the agreement, were turned over to Mr. Buchner. The bonds were therefore held by the Merchants National Bank for the joint benefit of appellants, John M. and T. S. Gentle, and when they were turned over to Buchner as part of the consideration for which he undertook, in addition to other things, to pay off \$1,150 on the note to the Merchants National Bank, both of the appellants obtained the advantage thereof. The benefit derived from the disposal and transfer of the bonds was a joint one, and whatever liability was incurred by appellants was therefore a joint one.

It is contended that appellant T. S. Gentle is not liable to appellee unless he knew that the equitable title to the school bond in question belonged to her. We do not think this ground well taken. T. S. Gentle received the benefit of the



bond jointly with John M. Gentle, and he must therefore be charged with the amount received, even though he did not know that the equitable title to the bond was in appellee.

"An action for money had and received will lie whenever one person has received money which in justice belongs to another, and which in justice and right should be returned. \* \* \* The scope of the action has been enlarged until it embraces a great variety of cases, the usual test being, does the money in justice belong to the plaintiff, and has the defendant received the money, and should he, in justice and right, return it to the plaintiff." *Wilson v. Turner*, 164 Ill. 398.

It is also insisted that although appellants may have turned over to Buchner the school bond in controversy, still that does not entitle appellee to maintain an action against appellants and recover under the common counts for the value of the bond. But appellants applied the bond to their own use, and the law is well settled that where one wrongfully takes the goods of another and applies them to his own use, the owner may waive the tort, and charge the wrongdoer in assumpsit on the common counts, as for goods sold, or money received. *City of Elgin v. Joslyn*, 136 Ill. 525; *T. W. & W. R. W. Co. v. Chew*, 67 Ill. 378.

It is further insisted by appellants that the judgment is erroneous, because there is no evidence that they received \$200 in "money or money value" for the bond owned by appellee. The agreement between appellants and Buchner provided for the delivery of "school bonds of \$400." The bonds were shown to be two in number and for the face value of \$200 each. A fair inference from the agreement, therefore, is that the bonds were turned over for their face value, and appellants seem to have received credit for them in that amount.

We are therefore of opinion that the judgment of the court below, which was for the face of bond No. 4 only, was right, and it is accordingly affirmed.

## The People ex rel., etc., v. John B. Mount, Mayor of Joliet.

1. **DRAM-SHOP LICENSE—Power of Municipalities to Determine the Amount of.**—A city is without authority to determine the amount of license to keep a dram-shop by resolution; it can legally fix the same only by an ordinance.

2. **ORDINANCES—Repeal of.**—An ordinance legally enacted can not be repealed by resolution.

3. **CITIES AND VILLAGES—When Ordinances are Necessary.**—Acts of municipal corporations, which are legislative in their character, must be enacted in the form of ordinances, and not of resolutions.

4. **DRAM-SHOP—Power to License.**—The power to license, regulate or prohibit is a dormant power, and affords no authority to issue licenses until it is called into life and put into operation by appropriate legislation by the proper authorities.

5. **SAME—Requisites of the Legislation.**—Without the adoption of a general ordinance on the subject, authorizing the issuing of licenses, and specifying who shall issue them, the length of time they shall run, the amount to be paid by the applicant, the time and manner of payment, etc., municipal authorities are powerless to issue license to any one.

6. **CONSTRUCTION OF STATUTES—Repeal by Implication—Rules.**—The law does not favor a repeal by implication. The earliest of two statutes continues in force unless the two are clearly inconsistent with, and repugnant to each other, or unless in the latest statute some express notice is taken of the former, plainly indicating an intention to repeal it. Where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former, by implication. So a subsequent statute, which is general, does not abrogate a former statute which is particular.

7. **SAME—General Statute Without Negative Words—Repeals.**—A general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent.

8. **SAME—Inconsistent Acts.**—If two statutes said to be inconsistent can be so construed that each may be enforced, such construction is to be adopted as will give effect to the legislative will, as expressed in each act.

9. **SAME—Subsequent Acts Without Negative Words.**—A subsequent law which is general, does not abrogate or repeal a former one which is special, and intended to operate upon a particular subject; and if the latter statute does not contain negative words it will not repeal the particular provisions of the special law on the same subject, unless it is impossible that both should be enforced.

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**Mandamus.**—Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

HALEY & O'DONNELL, C. W. BROWN and MARK G. HARRIS,  
attorneys for appellant.

RICHARD J. BARR, COLL McNAUGHTON and GEORGE S.  
HOUSE, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a proceeding instituted by the appellant William Conlon, as relator, for a writ of mandamus to compel appellee, as mayor of the city of Joliet, to sign a dram-shop license.

The petition was filed July 7, 1899, and avers that the relator is a citizen and taxpayer of the city of Joliet, which is incorporated under the general laws of the State, and is authorized by its charter to license and regulate the sale of liquors; that said city has in force an ordinance in regard to the sale of intoxicating liquors, which provides for the issuing of licenses to sell the same to persons who shall apply and give bond in the manner therein provided, upon their "paying for such license for the use of said city at a rate that may be from time to time established per annum;" that since the 1st day of July, 1892, and before the commencement of each municipal and fiscal year, the city council has regularly fixed and established the dram-shop license fee for each of said years, as provided by said ordinance; that on June 26, 1899, the city council fixed, by resolution, said license fee at the sum of \$500; that on June 27, 1899, the relator presented his petition for a dram-shop license, and filed the bonds required by the city ordinance and the laws of the State, with the city clerk, and that said bonds were on the same day duly approved by unanimous vote of the city council; that on July 1, 1899, the relator paid to the city treasurer the sum of \$500 as required by the ordinance and resolution, and the latter issued his receipt therefor; that the receipt was presented to the city

clerk and a demand made upon him for a dram-shop license; that the clerk prepared and countersigned a license in the form prescribed by the ordinances, authorizing the relator to conduct the business of dram-shop keeper from July 1, 1899, to July 1, 1900; that the relator presented said license and receipt to the respondent and requested him, as mayor, to sign said license, but that respondent then and there refused to sign the same and still neglects and refuses so to do; that by the ordinances of said city it is provided that no license shall be granted for a longer period than one year, and all licenses shall be signed by the mayor and countersigned by the city clerk, under the corporate seal; that by force of the ordinance and laws of the State of Illinois it was the duty of respondent to sign said license, and that his refusal so to do was unlawful and illegal. The petition concluded with a prayer for a peremptory writ of mandamus.

The respondent filed his answer, setting forth the reasons why he refused to sign said license, at length. They were in effect as follows:

First. That the resolution of the city council, fixing the dram-shop license for the municipal year, commencing July 1, 1899, at \$500, was void, for the reason that the city was without power or authority to determine the amount of the license by a resolution, but could legally fix the same only by an ordinance.

Second. That if the power to fix the license fee could be properly and legally exercised by resolution, then the mayor had a right under the law to veto such resolution; that he did veto the same, and it was not passed by the council over his veto, and therefore the resolution never became operative.

Third. That for several years prior to the time relator presented his license to the respondent for signature, there was in force an ordinance of the city fixing the license fee at the sum of \$1,000 per annum, payable in advance; that such ordinance, being in force at the time of the passage of said resolution, could not be repealed by the resolution, and

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that therefore relator was not entitled to a license by paying or offering to pay a less amount than \$1,000.

Fourth. That the dram-shop bond required by law of the relator under the fifth section of the dram-shop act was not at the time the petition was filed, and has not since been approved as required by said section.

Issues were joined and a jury waived. The proofs having been heard, the court found for the respondent and denied the writ, at the costs of the relator.

There was no question as to the facts in this case. It appeared from the proofs that the city of Joliet was organized under the general incorporation act, and that it has seven wards and fourteen aldermen. By chapter 25 of the revised ordinances of 1884, the city council was authorized to grant a license to keep a dram-shop to any person applying therefor in writing, upon such person complying with certain requirements therein set forth, "and paying for such license for the use of said city at a rate that may be from time to time established per annum." Under this ordinance the license fee was fixed by the council by resolution or motion up to the year 1889. On June 27, 1889, an ordinance concerning dram-shop licenses known as No. 796 was passed, fixing the license fee at the sum of \$1,000 per annum, payable in advance, and repealing all ordinances and parts of ordinances in conflict therewith. In 1891 the ordinances of the city of Joliet were revised and an ordinance enacted for the adoption and publication of the same. Chapter 33 of the revised ordinances of 1891 was entitled "Intoxicating Liquors," and provided, among other things, for the granting of licenses to dram-shop keepers. The provision in regard to the payment of a license fee was identical with that of the ordinances of 1884; that is, that the person desiring the license might obtain it by complying with certain other prerequisites, "and paying for such license for the use of said city at a rate that may be from time to time established per annum." It was also provided by the revised ordinances of 1891 that "all ordinances of the city of Joliet heretofore passed in relation to the subject-matter of, or

inconsistent with any of the provisions of the following chapters mentioned in section No. 208 hereof (which included chapter 33 as to intoxicating liquors above mentioned), be and the same are hereby severally repealed." Acting upon the theory that the revised ordinances of 1891 repealed ordinance No. 796, and that the amount of the dram-shop license could be fixed by a resolution, the city council, at a regular meeting on June 26, 1899, by a vote of eight ayes to six nays, adopted a resolution or motion that "dram-shop license beginning July 1, 1899, be and is hereby fixed at \$500, payable in advance."

The resolution fixing the amount of the license was vetoed by the mayor in a written message duly presented by him to the city council. No attempt was made to pass the resolution over the veto. In pursuance of said ordinance and resolution, the relator filed the bonds required; deposited the sum of \$500 with the city treasury and presented his license to the respondent for signature, in the manner set forth in the petition. The respondent refused to sign the license for the reason, as given to him by the relator, that the amount of money named by it was not sufficient. He also wrote to the city clerk and the city treasurer notifying them "not to accept from any person or persons a license fee of \$500 for each dram-shop, as fixed in said resolution."

The first question which arises upon this record and the one of greatest importance is whether the city of Joliet could lawfully fix the amount of the license fee by resolution, or only by an ordinance, duly enacted according to law.

By article 3 of the general incorporation act, which for convenience we may call the charter of the city, the yeas and nays must be entered of record upon the passage of all ordinances, and the concurrence of a majority of all the members elected is necessary to the passage of an ordinance. A quorum of the city council consists of a majority of the aldermen elected, and a quorum being present, a majority of those present can transact ordinary business and

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pass resolutions, unless they create a liability against the city. An ordinance of the city of Joliet must therefore have at least eight votes in its favor in order to pass it, and the names of those voting for and against it must be entered of record, while a resolution can be passed by a majority of a quorum, and without the yeas and nays being taken or entered, unless specially demanded by a member. The mayor may veto an ordinance, and if he does so two-thirds of the members elected to the city council must agree by yeas and nays entered of record to pass it over the veto, or the ordinance fails to become a law. While, therefore, it requires eight votes to pass an ordinance of the city and ten votes to pass it over a veto, a majority of a quorum, or five members of the council, can pass a resolution and the mayor can not interfere with it. In order, no doubt, to prevent hasty, crude and unwise municipal legislation, the legislature, in giving to city councils certain law-making powers, surrounded the passage of ordinances with safeguards, and placed their enactment beyond the control of a bare majority of a quorum, or even of a majority of the aldermen elected, where the mayor disapproves. No such safeguards are thrown around the passing of motions and resolutions. It can not be supposed that the legislature intended to leave the city council to determine at its own pleasure, in every case, whether it will act by ordinance and be subject to the checks and restrictions surrounding ordinances, or will act by resolution and be free from restraint. The inference to be drawn from a consideration of the act conferring the authority rather is that the legislature intended, as a general rule, that enactments of the city council should be by ordinance.

Article 5 of the charter confers upon the city council a variety of powers, a great majority of which must be exercised by means of ordinances. Those giving power to issue dram-shop licenses are the fourth subdivision of section 1, Art. 5, which is "to fix the amount, terms and manner of issuing and revoking licenses," and the 46th, which is "to license, regulate and prohibit the selling or giving away of

any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license." The 96th subdivision grants the power "to pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper."

In *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439, it was said that the words "ordinances, rules and regulations," as used in said paragraph 96, are identical in meaning. Said clause therefore, as so interpreted, may be considered as if it read, "The city council shall have power to pass all ordinances proper or necessary to carry into effect the powers granted to cities," etc. The charter in several places provides for such rules and regulations as the city council may, by ordinance, prescribe, and uses other like language implying that the rules, regulations and restrictions authorized by that instrument are to be prescribed by ordinance. In the case last above referred to, it was further said:

"A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation which are to have continuing force and effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions. It is true that where the charter of a municipality is silent as to the mode in which the city council shall perform an act, the decision of the council may be evidenced by either a resolution or an ordinance. But where the charter requires an act to be done by ordinance or where such a requirement is implied, as it is there, by necessary inference, a resolution is not sufficient, but an ordinance is necessary. \* \* \* Acts of the city, which have for their object the carrying into effect of the charter powers thus granted, are legislative in their character; and it is well settled that acts of municipal corporations, which are legislative in their character, must be put in the form of ordinances and not of mere resolutions."



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We conclude, from the above authority, that if the act is legislative in its character and prescribes general rules, regulations, restrictions or penalties, applicable to the public generally, it can only be adopted by ordinance, while if it is ministerial, it may be accomplished by resolution.

In the case of *The People v. Village of Crotty*, 93 Ill. 180, it was said, in speaking of the licensing of dram-shops:

“This power to license, regulate and prohibit is a dormant one, and affords no authority to issue licenses until called into life and put in operation by appropriate legislation by the municipal authorities. Without the adoption of a general ordinance on the subject, authorizing the issuing of licenses, and specifying who shall issue them, the length of time they shall run, the amount to be paid by the applicant, the time and manner of payment, etc., the village authorities are powerless to issue license to any one.”

It is clear that it is general legislation to enact that liquor licenses shall be granted to all who apply therefor, under certain conditions, and to prescribe those conditions. It is argued, however, that the ordinance in question answered all the requirements of the law, even to the providing for the payment of a license fee, which was to be “at a rate that may be from time to time established per annum;” that the mere fixing of the amount of the fee provided for by the ordinance was temporary and ministerial and could therefore be done by resolution.

There is no part of an ordinance for the granting of licenses for the sale of intoxicating liquors more important than that which provides for the payment of a license fee. Section 1 of the dram-shop act of 1883 provides that it shall not be lawful for the corporate authorities of any city to grant a license for the keeping of a dram-shop, except upon the payment in advance of such a sum as may be determined by the respective authorities of such city, not less than at the rate of \$500 per annum.

The law in relation to the subject is wholly based upon the theory that a license fee should be paid for the sale of such liquors, and that matter is made the most prominent feature of the law. We can not say, therefore, that it was

the intention of the legislature to provide that all other questions connected with the granting of licenses should be provided for by ordinance, while the amount of the license fee could be fixed by a mere resolution passed by a majority of a quorum, with or without the consent of the mayor. Such a construction of the law does not appear to us to be reasonable.

We think that not only is it general legislation to determine that the sale of liquor shall be permitted and to prescribe the conditions, but that it is equally an act of general legislation to determine the fee which must be paid for the privilege. All these regulations apply in the same manner to all the public, and any person who chooses is entitled to engage in the business by complying with the terms prescribed.

We therefore hold that the amount of the license fee in question could not be fixed by a mere resolution, and that the resolution passed by the council June 26, 1899, fixing the license fee at the sum of \$500 for the year commencing July 1, 1899, was void and of no effect. The resolution being void the action of the mayor in vetoing it was immaterial and the effect of such veto need not be discussed.

The next question presented is, whether or not the ordinance of June 27, 1889, known as ordinance No. 796, fixing the license fee at \$1,000, was still in force at the time appellee refused to sign the license in question. So far as this case is concerned, it probably is not necessary to decide the question, as in view of what we have above said, appellee was justified in refusing to sign the license. If ordinance No. 796 was in force, he would not have been authorized in signing the license for the reason that the sum proffered for the same was not sufficient. If that ordinance was not in force, there was no ordinance whatever fixing the amount of the license fee, and therefore no license could lawfully be issued. In view of the circumstances surrounding this case, however, and as the question is presented for decision by counsel on both sides, we deem it best to pass upon the same at this time.

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By section No. 208 of the revised ordinances of September 28, 1891, chapters 1 to 62, inclusive, were adopted and declared to be the ordinances of the city of Joliet. By section 209 it was provided that "all ordinances of the city of Joliet heretofore passed in relation to the subject-matter of or inconsistent with any of the provisions of the following chapters mentioned in section 208 hereof, be and the same are hereby severally repealed."

The question is whether ordinance No. 796 is "in relation to the subject-matter of or inconsistent with any of the provisions" of those chapters of the revised ordinances mentioned in section No. 208. The subject of chapter 33 of the revised ordinances of 1891 is "Intoxicating Liquors." It provides for issuing licenses to sell such liquors, prescribes the restrictions under which sales shall be made, the bond to be given, and provides that the dram-shop keeper shall pay for his license "at a rate that may be from time to time established per annum."

Ordinance No. 796 relates solely to the amount of the license fee to be paid, which it placed at \$1,000. While they are both upon the general subject of liquor licenses, yet the particular subject of each is different from the other. The subject-matter of one is the granting of licenses and the conditions imposed upon those desiring to sell intoxicating liquors; the subject of the other is the rate to be paid by such parties for the privilege. The two are not inconsistent with each other, but both can stand and neither interferes with the operation of the other. From the time the revised ordinances were passed in 1891 until 1899, the city council annually, by motion or resolution, recognized \$1,000 as the proper amount to be paid for the license fee. If ordinance No. 796 was not in force then all subsequent acts of the city in granting licenses were unlawful, while if it was in force such acts were wholly in accord with the law. We are inclined to that construction which finds that the council proceeded in accordance with the law, rather than to the contrary one.

In *Town of Ottawa v. County of La Salle*, 12 Ill. 339, it is said:

"It is a maxim in the construction of statutes that the law does not favor a repeal by implication. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or unless in the latest statute some express notice is taken of the former, plainly indicating an intention to repeal it. And where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication. So a subsequent statute which is general, does not abrogate a former statute which is particular."

In *Covington v. East St. Louis*, 78 Ill. 548, the doctrine was recognized, that "a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent." In *Trausch v. The County of Cook*, 147 Ill. 534, it is laid down as a well known principle that "repeal by implication is not favored, and if the two acts said to be inconsistent can be so construed that each may be enforced, such construction is to be adopted as will give effect to the legislative will as expressed in each act."

In the recent case of *Village of Ridgway v. Gallatin County*, 181 Ill. 521, where the question of the repeal of a prior special law by a subsequent general law was under consideration, the court said:

"Such a repeal is not favored in the law and a later statute will never be held to repeal an earlier one unless they can not be reconciled. It is the duty of the courts to construe them so as to avoid repeal if such a construction can be given, and a statute will never be held to be repealed by implication if it can be avoided by any reasonable hypothesis. It is also the rule that a subsequent law which is general does not abrogate or repeal a former one which is special and intended to operate upon a particular subject, and that if the later statute does not contain negative words it will not repeal the particular provisions of the special law on the same subject, unless it is impossible that both should be enforced."

The rules above laid down for the construction of laws of the State are equally applicable to the construction of ordinances. It is not only possible for both of the ordinances

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in question to be enforced, but it is also true that unless they are enforced together, great confusion and inconvenience will ensue. Ordinance No. 796 is not repealed by title in the revised ordinances, and for the reasons above given it can not be held to be repealed by implication. It was therefore in force at the time appellant refused to sign the license in question.

It is unnecessary to consider the question whether the bond presented by appellant was approved as provided by law or not, as it was the duty of the mayor, for the reasons above given, to refuse to sign the license presented to him by appellant, regardless of the question of the approval of the bond.

The action of the court below in denying the peremptory writ of mandamus was in conformity with the law, and the judgment is accordingly affirmed.

MR. JUSTICE DIBELL, having presided at the trial in the court below, took no part in the consideration of the cause in this court.

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**Peter Karthizer v. Bright B. Fixen.**

1. **DECLARATION**.—*Insufficient—Contracts to Bid at Sales.*—Where under a chancery decree A had a lien on certain real estate, and B had a second lien on part thereof, A promised B to bid a certain sum on the part subject to his lien only, and failing to do so, B was forced to bid and pay for the second tract \$450 more than would have been necessary had A bid as he agreed. In a suit to recover the \$450 from A, the declaration showed that the time of redemption from the sale had not expired, and it did not aver that the premises were worth less than B paid for them. *Held*, that the declaration did not show that B was entitled to recover the \$450 from A.

**Assumpsit.**—Appeal from the Circuit Court of Kane County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.

M. O. SOUTHWORTH and ALSCHULER & MURPHY, attorneys for appellant.

S. N. HOOVER and R. G. MONTONY, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Fixen sued Karthizer for breach of a written contract. To the amended declaration again amended, defendant demurred. The court overruled the demurrer, and defendant elected to abide thereby. The court heard proofs and entered judgment against defendant for \$523, from which he appeals.

From the declaration and the contract therein set out it appears that Karthizer was one of the complainants and Fixen one of the defendants in a chancery cause in Du Page county; that proofs had been taken and the master had reported that Karthizer was entitled to a lien for a large sum of money upon the whole of certain lands; that upon block J, parcel of said lands, he was entitled to a lien to the extent of \$125 per acre, and Fixen, purchaser of block J, had a second lien on said block J for improvements he had placed upon it to the amount of "several thousand dollars"; that after the filing of said report, and before decree entered, Karthizer and Fixen made a written agreement to the effect that if a decree should be entered establishing said liens, then at the master's sale Karthizer should bid on the lands other than block J all his claim but \$50, and Fixen should bid on block J such sum as he saw fit to cover his improvements, and \$50 additional, and should pay the master his commissions on the amount bid on block J, and said \$50 for the benefit of Karthizer; that if Karthizer got a deed for said other lands he should have the option (for thirty days after deeds were issued) to exchange two certain acres of said other lands for two certain acres of block J. The declaration alleged Karthizer did not bid as much as he agreed, but \$450 less; that Fixen bid \$10,000 for block J, and it was struck off to him at that price; that he tendered the master his own receipt for \$9,500 and his check for \$50, and exhibited said contract with Karthizer to the master, all as a payment of his bid of \$10,000 for block J; that Karthizer objected, and repudiated said contract with Fixen; that the master, acting upon Karthizer's objection, refused to accept said payment, and was about to again offer block J for sale, whereupon Fixen paid \$500

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in cash under protest, and delivered his receipt for \$9,500 to the master, and the master reported the sale, and it was approved; and said \$500 so paid by Fixen on block J was applied upon the sum due Karthizer under said decree. The declaration avers that thereby Karthizer became liable to pay Fixen the \$450 which Fixen was compelled to pay the master in excess of the \$50 which by the contract he was to pay.

The declaration does not show what other parties to the suit were owners of said other lands, nor aver sufficient so that we can know how this contract, by which Karthizer was in effect to place more of his lien on their lands and less on block J than the master's report contemplated, would affect them, nor whether because of their interests it was against public policy. It does not show who owned block J. It does designate Fixen as purchaser thereof, but as it was sold not only to pay Karthizer's first lien thereon, but also to pay Fixen's second lien for improvements placed by him thereon, the implication is that some one else owned it. The declaration does not state how many acres were in block J, and therefore does not disclose the sum total for which Karthizer had a lien upon it. It does not clearly appear whether by the sale Fixen's lien was satisfied in full, though the implication seems to be that the \$9,500 receipt, which he offered the master, was in full, nor to whom the surplus, if any, arising from the sale of block J, was payable, nor how much block J was worth.

The declaration therefore does not show that Fixen suffered any damage or pecuniary loss by the failure of Karthizer to bid the sum agreed upon said other lands. If block J was worth all Fixen bid for it, then if it is not redeemed he will get a deed of property worth what he paid, and he will have lost nothing. The sale was January 20, 1896. This suit was brought April 10, 1896, before the time for redemption had expired. If block J was afterward redeemed, he then got back all he paid, with interest, and suffered no loss. If the \$9,500 paid his lien in full, still he would have had to pay the whole \$10,000 of his bid. If Karthizer had kept his contract and required only \$50,

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Fixen could not have kept the \$450 after his lien was satisfied, but it would have been payable to the master and by him to the owner of block J. Other defects suggested, we think, should not be discussed in the absence of fuller averments.

We conclude that the declaration did not show a right to recover the \$450. The judgment is therefore reversed and the cause remanded.

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**John W. Martin v. The Chicago, B. & Q. R. R. Co. and  
The City of Sterling.**

1. *STREETS — Obstructions — Justification Under Ordinances.* — In order to justify the placing of building materials in a public street under an ordinance permitting a party to use part of a street adjacent and opposite to his premises, for the purpose of placing building materials thereon, whenever such use should be necessary during the continuous construction of a building on his premises, it must appear that the material occupied no greater part of the street than allowed by the ordinance and that such materials were so placed when such use of the street was necessary during the continuous construction of the building.

**Trespass De Bonis Asportatis.**—Appeal from the Circuit Court of Whiteside County; the Hon. FRANK RAMSEY, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

F. E. ANDREWS and H. C. WARD, attorneys for appellant.

W. N. HASKELL, C. L. SHELDON and A. A. WOLFERSPERGER, attorneys for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action of trespass, with counts in trover, brought by appellant against appellees for the taking and conversion of some seventy cords of stone belonging to appellant and piled in a public street, known as Depot street, in the city of Sterling, Illinois.



Appellees pleaded the general issue and gave notice that under it they would prove (1) that said city was a municipal corporation and had charge of its streets and alleys, including Depot street, which was a public street; (2) that it was the duty of said city to keep the same open to public travel; (3) that appellant deposited a large quantity of stone in said Depot street, in violation of the city ordinances, and (4) that said city employed said defendant, the Chicago, Burlington & Quincy Railroad Company, to remove said stone. At the trial there was a verdict and a judgment for defendants, from which the plaintiff appeals.

The proof shows that in December, 1882, the Chicago, Burlington & Quincy Railroad Company, one of the appellees, acquired from the city council of Sterling the right to lay its main track along the center of said Depot street and side tracks along the north half thereof; that it afterward proceeded to build and lay its tracks along the center and north half of said street, and has since so occupied such portion of the same.

The south half of the street was retained by the city as a public thoroughfare, but was used by persons having business with the railroad to load and unload freight from the cars placed along the main track. The street runs east and west and is sixty-six feet wide. About April 1, 1897, appellant, being the owner of certain lots adjoining said street on the south, with the alleged intention of building on said lots, hauled and deposited along said street, north of his premises, some sixteen cords of stone, in a pile about four feet wide and four feet high, the north line of which was some six or seven feet from the south rail of said main track. This stone was removed by the railroad company on April 6, 1897, and its removal is not involved in this suit, but immediately thereafter, appellant deposited another pile of some seventy cords of stone along said street of the same height and width, and about the same distance south of the main track. At the time this stone was so deposited, there was an ordinance of the city that no person should put obstructions of any kind in any street or alley

of said city, with the provision, however, that it should not be construed to prevent any person from using not more than one-third of the width of any street or alley adjacent and opposite to his premises, for the purpose of placing building materials thereon, whenever such use should be necessary, "during the continuous construction of any building on his said premises." On August 17, 1897, the ordinance above referred to was amended so as to provide that no person should leave or place obstructions of any kind in any street, without first obtaining permission from the city council, and that such council might, upon application, issue permits for a limited time and space to deposit building materials on portions of such street, when such occupancy was required in connection with the construction of buildings on adjacent lots. This amendment of the ordinance was admitted in evidence by the court, as stated at the time, not as a matter of justification, in case it should appear there was a conversion of the property, but in mitigation of punitive damages. The stone placed in the street by appellant was permitted to remain there until October 30, 1897, when it was loaded on cars of said railroad company by its employes and taken away, and a few days later deposited on some vacant lots owned by said company about 2,000 feet distant from appellant's lots. On December 24, 1897, this action was commenced by appellant against the railroad company and the city. That the city of Sterling was a municipal corporation, having charge of its streets and alleys, and that it was its duty to keep the same open to public travel is not contested by appellant, but he insists, first, that there is no proof that the city employed the railroad company to remove the stone, and second, that it does not appear that appellant deposited the stone in the street in violation of the ordinances of the city.

Appellant's first proposition is plainly unwarranted, although he repeats it a number of times, both in his original brief and in his reply. Upon the trial a question was asked by one of the attorneys for appellant concerning the train which removed the stone, when the attorney for the

city remarked that it was not necessary to take up time with that, as it was conceded that the city took the stone and employed the railroad company to do it. Later on it was proposed by appellees to show the arrangement between the city and the company under which the stone was removed, but counsel for appellant objected on the ground that it was already admitted that the city had employed the railroad company to do the work, and further proof was therefore not made. Under these circumstances, appellant is not in position to insist that there was no proof of the employment of the railroad company by the city.

The question then arises, was the stone deposited by the appellant in the street in violation of the ordinances of the city? The ordinance in force at the time the greater part of the stone was placed there, provided for the use of not more than one-third of the width of the street, adjacent and opposite to the premises, for the purpose of placing building materials thereon whenever such use should be necessary during the continuous construction of any building on said premises. The street was sixty-six feet wide, so that under the ordinance appellant could, in any event, only have the right to use the south twenty-two feet of it for the purpose of storing building material. The north line of the stone, however, extended twenty-four feet north of the south side of the street, so that he was using two feet of the street without any authority whatever, and as to such was a trespasser.

About April 1, 1897, appellant set some men to work digging trenches on his said premises, and afterward had some stone laid in the same, a part of one wall reaching the height of some four feet. Such work, however, was carried on in the most desultory manner. Part of the time the men worked in the quarry owned by appellant or were engaged in dressing stone, and a greater portion of the time no work at all was being done in reference to the construction of buildings upon said lots. There is nothing to show that any stone at all was laid after July, 1897. The evidence as a whole fails to show that there was a continuous

construction of any building on said premises as contemplated by the ordinance.

It appears from the proof, however, that for some time there has been a controversy between the appellant on one side, and the city and the railroad company on the other, concerning the use of Depot street south of the railroad tracks. Appellant insisted that such portion of the street should not be used by teams engaged in loading or unloading cars standing upon the main track. He was unable, however, to get the city to assist him in preventing such use of the street. On the contrary the city attempted to keep the street open for such use, as well as general travel; and when appellant commenced to pile stone in the street about April 1, 1897, it caused the men engaged at the work to be arrested and the stone taken away. The stone, which was almost immediately afterward placed in the street by appellant, practically blocked the way to the cars for wagons and prevented the use of the street by the public for that purpose. These matters were proper to be considered as bearing upon the question whether appellant in good faith placed the stone in the street to be used during the continuous construction of a building on his said premises.

Neither of appellees claims any interest in the stone, nor have they converted it to any use whatever. They say that the stone is subject to the order and control of appellant, and that he can take the same whenever he so desires. We are of opinion that the stone was in the street in violation of the ordinances of the city, and, it being the duty of the latter to keep the street open to public travel, it properly caused the stone to be removed.

The only other question urged by appellant as a reason for reversing the case, arises upon the instructions. All of the instructions offered by appellant were given by the court as offered, while those presented by appellees were given with certain modifications. While there are some minor inaccuracies in the instructions, yet there are none of which appellant can justly complain, as the instructions

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as a whole fairly presented his theory of the case to the jury. The proof was sufficient to sustain the verdict, the case appears to have been fairly tried and the judgment will therefore be affirmed.

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**Pioneer Fire-proof Construction Co. v. William Sunderland.**

1. **MOTORMEN—Reasonable Care.**—A motorman in charge of an electric car is required to use reasonable care to avoid the danger of frightening horses, and, after discovering such danger, if his conduct is either grossly negligent, or willful and wanton, his employer will be liable.

**Action in Case,** for personal injuries. Appeal from the Circuit Court of La Salle County; the Hon. H. M. TRIMBLE, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

SAMUEL RICHOLSON, attorney for appellant; F. J. CANTY, of counsel.

BUTTERS, CARR & GLEIM, attorneys for appellee; LINCOLN & STEAD, of counsel.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit by appellee against appellant to recover damages for injuries alleged to have been sustained by him through the negligence, or willful and wanton misconduct, of servants of the latter.

This case has been in this court before. On the former trial the defendant below had secured a verdict in its favor and the case was reversed and remanded on account of error in an instruction and the admission of improper evidence. *Sunderland v. Pioneer Fire-proof Construction Co.*, 78 Ill. App. 102. There were seven counts in the original declaration, and, after the cause was remanded, two amended counts were added. Five of the original counts and one amended count charged negligence on part of appellant and its serv-

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ants, while two of the original counts and one amended count charged that the injury was caused by the willful and wanton acts of a servant of appellant. Upon the second trial in the court below the jury gave a verdict for appellee for \$2,000; judgment was entered for the amount of the verdict and an appeal taken to this court.

Appellant owned and operated fire-clay works in Ottawa, Illinois, and conveyed the clay used by it from the bank on the opposite side of the Fox river by means of clay cars drawn by an electric motor car, upon a track similar to an electric street car track. This track was laid along the south side of the Main street bridge across the river. The motor car had a frame-work extending eight or ten feet above the trucks on which it rested, and, while running, made a hissing sound similar to that made by an ordinary electric street car. The bridge was 237 feet long and eighteen feet wide, about one-third of the width being taken up by the car tracks. From the east end of the bridge the car track curved to the south. There was also a descent of some eight feet from the bridge to the street a short distance further east. The bridge was a public thoroughfare and within the city limits.

It appears from the weight of the evidence that at the time the injury is alleged to have occurred, appellee drove upon the west end of the bridge in a buggy, with a companion, the witness Chapman, just as a motor car drawing two coal cars, in charge of two of appellant's employes, was coming upon the east end of the same. One of the employes, the motorman, was in the front of the motor car, facing west. Appellee, seeing the car approaching, handed the lines to his companion, got out of the buggy, went to the head of his horse, which was already badly frightened, and tried to quiet him. Appellee claimed that he motioned and cried to the motorman to stop the car, but that the latter paid no attention to him and the car continued on its way until opposite him, when the motorman started it faster, thereby increasing the noise and hissing sound, causing the horse to run away. Appellee was dragged by the

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horse to the east end of the bridge and thrown down, suffering fractures of his leg, collar bone and elbow joint. The injuries received by him caused him great pain and suffering, and are, to some extent, permanent. Appellee claimed and produced evidence to the effect that the horse was ordinarily quiet and had never before exhibited unruly symptoms. Appellant claimed and produced evidence tending to show that no signals were given by appellee to the motorman; that the speed of the cars was not increased; that the horse was unsafe, and was known to be so by appellee, and that the latter had sufficient time and opportunity to have taken the horse from the bridge in safety after he saw the cars coming. The weight of the proof, however, was evidently in favor of appellee, and the jury was justified in so finding.

It was claimed by the appellant that its cars had the right of the bridge and the streets through which it passed, as well as the horse and buggy of appellant; that the mere fact that the horse became frightened at the appearance of or sounds made by the motor car and ran away, did not make the appellant liable, but that to entitle appellee to recover there must have been some misconduct on the part of appellant's servants having control of the motor car. To sustain his position appellant cites authorities relating to the operation of public electric street cars. We are not prepared to say that the rules applying to the running of public street cars, which are operated for the benefit of the public, apply with the same force to appellant's line, which is operated by a private corporation for its own benefit and is not subject to public use. But even if appellant's theory of the law is correct, as applied to this case, we are of opinion there was ample evidence to show that the motorman failed to use reasonable care to avoid the danger after discovering there was danger of the horse running away, and that his conduct was either grossly negligent or willful and wanton.

Appellant objected to the admission of certain testimony offered by appellee, concerning the disposition of the horse,

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on the ground that the witnesses were persons without experience with horses. Two of them were women who had each driven the horse a number of times, and the others were men who had either driven it or seen it frequently, one of them being a former owner. The knowledge of these witnesses as to the disposition of the horse covered a period prior and up to the time of the accident. There was no reason why this evidence was not entirely competent, and it was properly admitted. Appellee offered no instructions. Several of the instructions given for appellant, however, were so modified by the court as to announce the now obsolete doctrine of comparative negligence, and this action of the court is urged by appellant as a reason for reversing this case. The jury, however, was repeatedly instructed that appellee could not recover unless, at the time of the accident, he was in the exercise of ordinary care for his own safety.

The instructions, when read together, plainly told the jury that the exercise of ordinary care was required of appellee as a condition to his right of recovery, and therefore the error was not sufficient to reverse the case. *C. & A. R. R. Co. v. Matthews*, 153 Ill. 268; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581.

We find in the record no error of sufficient gravity to warrant the reversal of the judgment in this case, and the same is accordingly affirmed.

MR. PRESIDING JUSTICE CRABTREE dissenting.

I can not concur in affirming the judgment in this case. In my opinion the question as to whether appellee showed any right of recovery was very close upon the facts. The instructions as modified could scarcely fail to have misled the jury, and for that reason I think the judgment should be reversed.



**Albert B. Sumner and Charles P. Sumner, Adm'rs,  
etc., v. The Elgin Condensed Milk Co.**

1. *TRIALS—By the Court—Conclusive, When.*—Where the judge before whom a case is tried has ample opportunity to investigate the questions of fact which arise, the case appears to have been fairly tried, and there is evidence to support the finding and judgment, the Appellate Court will not be disposed to disturb it.

*Assumpsit, for goods sold, etc.* Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

JOHN A. RUSSELL, attorney for appellants; SAMUEL ALSCHULER, of counsel.

BOTSFORD, WAYNE & BOTSFORD, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit in assumpsit, brought by W. P. Sumner against appellee to recover a balance of \$798.01 claimed to be due him from the latter.

The declaration contained the common counts and two special counts. One of the special counts charged that Sumner bought from appellee certain condensed milk, which was warranted to be sound and merchantable, but proved to be damaged and unmerchantable, whereby he lost the benefit of selling the same. The other charged that appellee guaranteed said milk to be sound and merchantable and agreed that in case the same should prove otherwise that Sumner should have the right to return the same and receive credit at the price paid therefor, with freight charges added; that the milk proved to be unsound and unmerchantable and was returned to appellee, who thereupon became liable to pay the price of said milk, together with freight charges. Appellee filed the general issue and a plea of set-off. A jury was waived and a trial had before the court. After the cause was heard, but before judgment

was entered, W. P. Sumner died, and the administrators of his estate were substituted as parties in his place. The court found for appellee and entered a judgment in its favor against appellants for \$850.

The proof showed that in 1889 W. P. Sumner, being then engaged in the milk and butter business at Jacksonville, Florida, entered into an agreement with appellee to handle its condensed milk. He was to pay the current rate of prices for the various brands of milk, but was to receive a brokerage of two per cent for handling the same. Appellee guaranteed that all milk shipped to Sumner should be sound and merchantable, and agreed that the latter should have the right to return damaged goods and receive credit therefor at the rate the same were charged to him, with freight charges added. Sumner was instructed to guarantee the milk to his customers. Under this arrangement appellee shipped milk to Sumner from time to time, as ordered by him, until March 24, 1893, when the last carload was forwarded to him. This carload was shipped upon the receipt of an order from Sumner and amounted in value to \$1,575. From the time he commenced handling the goods Sumner had returned such goods as he found to be unsound, and received credit for them in accordance with the agreement. Previous to the shipment of the last carload, however, the percentage of the cans returned by him was comparatively small.

On April 15, 1893, a settlement was had between Sumner and appellee and the former paid by check \$1,494.52, in full of the amount due from him to appellee at that time. This settlement, however, did not include the amount due for any goods shipped Sumner after February 7, 1893, as the credit upon which they were sold had not then expired. On May 30, 1893, appellee drew on Sumner for \$1,500 on account of the last carload shipped him, and he returned the draft unpaid. At the same time he complained of the milk which had been sent to him, but said, "I will send you some funds on it very soon." A few days later he again wrote, stating he was trying to reduce the stock as much as possible before sending the balance back, and would send

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"some funds in a few days." He failed, however, to send any money, but returned milk from time to time, the last lot having been returned in September, 1893. Sumner claimed certain credits in his favor, which, including the last carload of milk returned, would have overpaid his account to appellee to the amount of \$798.01, for which sum suit was brought.

On the other hand appellee claimed that a large portion of the milk returned was rejected by Sumner without reason, and that he was not entitled to credit for the same. There is no question of law presented by the record or argued by counsel for the decision of this court, the only question being one of fact. The proof shows that some of the goods returned by Sumner were several years old, some had labels off and could not be identified as goods belonging to appellee, some were cans from which the contents had been removed, while some had labels of other companies upon them.

It does not appear, satisfactorily, from the testimony and letters of Sumner himself, that he knew that all the goods returned were unsound, and some of them were in fact afterward sold to other parties by appellee. It appeared from the evidence that condensed milk would not keep for an unlimited time in a warm climate, and we do not think that the privilege of returning goods given to Sumner was intended to include all goods sold to him, regardless of the length of time they had been in his possession or in the possession of his customers. Sumner was therefore not entitled to credit for those cans whose identity as to time of manufacture had been destroyed, by loss of label or otherwise, or for such milk as he neglected to return within a reasonable length of time.

The judge before whom this case was tried in the court below had ample opportunity to investigate the question of fact which arose, and as the case appears to have been fairly tried, and there is evidence to support the finding and judgment, we are not disposed to disturb the same. The judgment of the court below will accordingly be affirmed.

# **Economy Light & Power Company v. Joseph Stephen, Adm'r.**

1. **ELECTRICITY—Care Required in Dealing With.**—Where a person deals with a dangerous agent for his pecuniary gain, the degree of care devolving upon him should be in proportion to the dangers which it is his duty to avoid.

2. **DAMAGES—Excessive—In Cases of Death from Negligence.**—It is for the jury to assess the damages in cases of death resulting from the negligent use of electrical appliances, and unless the court of review can see that the verdict is the result of passion and prejudice, or is unreasonable, it will hesitate to interfere on the ground that the amount is excessive.

**Action in Case.**—Death from negligent act. Appeal from the Circuit Court of Will County; the Hon. JOHN SMALL, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

GARNSEY & KNOX, attorneys for appellant.

DONAHOE & McNAUGHTON, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action on the case brought by appellee against the Economy Light & Power Company, a corporation, and Harry B., H. Fred and Horace Humphrey, as defendants, to recover damages for the benefit of the widow and next of kin of Frank Duffy, whose death is alleged to have been caused by the negligence of said defendants.

The amended declaration upon which the case was tried consisted of eight counts. It was substantially set forth, in each of the first six counts, that the Economy Light & Power Company, appellant, was, on the 22d day of January, 1898, engaged in furnishing, selling and renting electricity to consumers, and was possessed of and operating an electric light plant; that, as appurtenant to its electric light system, it was possessed of certain electric wires termed "primary" wires, over which it caused to flow a dangerously high

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potential electric current of 1,000 volts pressure; that it was also possessed of certain other wires termed "secondary" wires, over which it caused to flow an electric current of low potential, to wit, a current of fifty-two volts pressure; that appellant used the current of high potential in connection with an electrical device commonly called a transformer, the purpose of which is to reduce the electric current from a high to a low potential before causing it to flow over the secondary wires, if used in electric lighting; that the Humphreys were customers of appellant, owning a certain building in which were electric wires, which were attached to the secondary wires of appellant and were designed and constructed for the use and consumption of a low potential electric current of not to exceed fifty-two volts pressure; that the existence and flow of the high potential current over said wires in said building was exceedingly dangerous to persons in and about the building; that Duffy was an employe of the Humphreys, engaged at work in said building, and was wholly ignorant of the laws governing the production, use and control of electricity, and was not advised of any existing danger; that it was the duty of appellant to so operate its electric light system as to prevent the escape of the high potential electric current from the primary wires to the secondary wires, and that it was the duty of the Humphreys to exercise ordinary care to keep the wires over which the electric current was conducted, in their building, in good and safe repair and condition; that appellant and said Humphreys neglected their several duties as above set forth, by means whereof said Duffy, while in said building and in the exercise of ordinary care for his own safety, came in contact with the electric wire over and along which there was then and there flowing, through the carelessness and negligence of appellant and said Humphreys, a dangerously high potential electric current of 1,000 volts pressure, and thereby received an electric shock causing his death. The seventh and eighth counts each charge that all of the defendants to the suit were engaged in furnishing the electric light and power,

and were also possessed of and using the premises where the accident occurred.

The negligence charged in the several counts of the declaration was that appellant carelessly and negligently employed a transformer in bad repair and unsafe condition, so that the high potential current aforesaid passed through said transformer, over and along the wires to the lamps in said building and that the Humphreys used inferior wire in said building, and permitted the same to become in bad repair, and the insulation to become worn off; that appellant negligently permitted the high potential current flowing over its primary wires to leak therefrom to and into the ground at points near the Humphreys' building, and permitted the insulation on said wires near said transformer to become worn and worthless; that there were leaks from various causes from the primary wires into and through the ground, and onto and upon the secondary wires aforesaid; that the transformer was so defectively constructed that the high potential current passed over and through it and thence over and along the wires intended for the low potential current that the Humphreys used.

There was a plea of the general issue and a trial by jury. The jury under the direction of the court found the Humphreys not guilty, while a verdict was returned against appellant for \$5,000, and judgment afterward entered for that amount.

Appellant urges, as reasons why the judgment should be reversed, that the verdict is against the evidence, the one instruction given for appellee erroneous, and the damages excessive.

The building used by the Humphreys where Duffy was employed, as shown by the proof, was lighted by electricity furnished by appellant. Duffy was killed about 4 o'clock on the afternoon of January 22, 1898. The day was stormy and the incandescent lights were used in the building, which was a foundry, during the afternoon. One of the workmen, Lowe, was engaged at work at a bench lighted by an electric lamp, attached to a long cord extending to the ceil-

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ing. The lamp could be carried from end to end of the bench, and Lowe had handled the drop cord several times for that purpose, during the afternoon, without injurious effect, although the insulation on it was ragged and torn. While Lowe was at work at the bench, Duffy, who was in his shirt sleeves, approached and spoke to him. While they were talking, Lowe says that he suddenly saw a flash and looking around, observed Duffy with his hand out as though he was either going to grab the wire or push it away. Duffy took hold of the wire with both hands, one on each side of the flame and fell, striking Lowe, who also fell and received at the same time something of an electric shock. Lowe then got up and took hold of the wire in an attempt to pull it loose from Duffy, but received a second shock which knocked him down, when he picked up a board and succeeded in breaking the wire at the place where the flame appeared. Lowe was not disabled in any way but Duffy was so seriously injured that he died a few moments later.

There was evidence introduced by appellee tending to show that the primary wires were grounded in certain places permitting leaks; that the insulation was worn from the wires near the transformer, permitting the current from the primary wires to pass to the secondary wires over the surface of the transformer, and that the transformer itself was of ancient date and not in good order. On the other hand, appellant introduced evidence tending to show that it was guilty of no negligence, and attempting to account for the accident by a minute puncture in the insulation between the primary and secondary wires in the transformer, which, it insisted, must have occurred by accident, just at the moment the flame appeared in the wire of the drop cord. It is certain from the evidence that a current of fifty-two volts will not cause any serious injury to one coming in contact with it, while a current of one thousand volts will cause death. In some way, therefore, the current from the main or primary wire must have gotten upon this local secondary wire. That Duffy was in the exercise of ordinary care for his safety at the time of the accident is not questioned.

The only important question involved in the case is whether or not it was through the negligence of appellant that the current from the main wire got upon the local wire. For pecuniary gain appellant deals with a dangerous agent, and the degree of care devolving upon it should be in proportion to the dangers which it is its duty to avoid. There was evidence tending to show that the company was guilty of negligence in operating its electric system, and that such negligence was the cause of the injury; and there was also evidence tending to show that the injury was caused by an accident which could not be foreseen. Under such circumstances the verdict of the jury should be permitted to stand, unless it is manifestly against the weight of the evidence. We are unable, however, to say that the verdict in this case is against the weight of the evidence.

Only one instruction was offered by and given for the appellee. That instruction told the jury that if they believed from the evidence that at the time in question Duffy came to his death while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended declaration, that his death was caused by the negligence of appellant as so charged, that he left surviving a widow and children, and that such widow and children were, by his death, deprived of their means of support, then in law, the plaintiff was entitled to recover. Appellant excepted to the giving of this instruction and now insists that it was erroneous. We think, however, that the instruction simply defined the proof necessary on the part of appellee to constitute a cause of action, and that it was properly given. It is also urged that the damages are excessive. It appeared that deceased was a strong, healthy man of about middle age (the exact age not being shown) who was capable of earning \$3.50 a day, and that he left a wife and two children.

The value of the life of the deceased, in a pecuniary sense, to his widow and children, is a question incapable of exact determination, and the amount, up to the limit of \$5,000, must be largely left to the discretion of the jury.



## Bates Machine Co. v. Bates.

In the case of C. & A. R. R. Co. v. Pearson, 82 Ill. App. 606, it was said by this court upon this question :

"It is for the jury to assess the damages, and unless the court of review can see that the verdict is the result of passion and prejudice, or is unreasonable, it will hesitate to interfere on the ground that the amount fixed is excessive."

This case appears to have been fairly tried. We have no reason to suppose that the verdict was the result of passion or prejudice, nor can we say that it was, under the circumstances of the case, unreasonable.

The judgment of the court below is therefore affirmed.

## Bates Machine Co. v. Albert J. Bates et al.

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1. **SPECIFIC PERFORMANCE**—*When it Can Not Be Demanded as a Matter of Absolute Right.*—Specific performance of a contract can not be demanded as a matter of absolute right in either party. Applications for it rest within the sound discretion of the court hearing the case.

2. **SAME**—*Requisites of the Application.*—Before a court of equity will compel the specific performance of a contract, it must appear that it is founded upon a good and valuable consideration, and is reasonably fair and just in all its parts.

3. **SAME**—*When it Will Be Denied.*—A court of equity will not lend its aid to give a party the benefit of an unreasonable or unjust contract, the enforcement of which would work a serious hardship.

4. **PATENTS**—*Assignment of Inventions.*—Courts draw broad distinctions between an obligation to assign inventions or improvements upon an existing thing, which the assignor has already assigned, and a mere obligation to assign in gross, inventions of any kind and character whatsoever, thereafter made. In the former case the courts have, as a rule, sustained such assignments.

**Bill for Specific Performance.**—Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed February 1, 1900.

GARNSEY & KNOX, attorneys for appellant; L. L. BOND, of counsel.

C. W. BROWN, attorney for appellees; JOHN R. BENNETT and E. H. GARY, of counsel.

MR. JUSTICE HIGBER delivered the opinion of the court.

Prior to the year 1888, Albert J. Bates and William O. Bates, brothers, had established themselves in business in the city of Joliet in this State, as inventors and manufacturers of special machinery.

It appears from the evidence that A. J. Bates was possessed of great skill in designing intricate automatic machinery, and that William O. Bates had like skill in putting the designs of his brother into practicable and merchantable shape. In January, 1888, their assets, according to their inventory, appeared to be about \$10,000, consisting of machinery used in their business, stock on hand and accounts. At that time, desiring to procure additional capital for the purpose of extending their business and making it more profitable, an agreement was made between the two brothers and one Joseph Winterbotham, by which the latter was to put certain money into the business and obtain an interest therein. This agreement was reduced to writing and is as follows:

"Be it known that A. J. Bates and W. O. Bates, under the name of Bates Brothers, being desirous of extending and enlarging their present business, have united their interests with Joseph Winterbotham, of Joliet, Illinois, under the following: Said A. J. and W. O. Bates put in their entire business, book accounts, notes, machinery, patterns, stock, etc., manufactured and unmanufactured, also all patents now in existence, and all inventions hereafter made by either the said A. J. or W. O. Bates. In consideration of the above, Joseph Winterbotham agrees to put in ten thousand dollars, five thousand dollars being hereby acknowledged, the remainder being paid as needed. It is the intention and full understanding of the parties hereto that they will, at earliest practicable time, organize a stock company with a capital stock of twenty thousand dollars, said capital to be made and fully represented by the assets above enumerated and the stock distributed as follows:

( $\frac{1}{4}$ ) one quarter to A. J. Bates.

( $\frac{1}{4}$ ) one quarter to W. O. Bates.

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( $\frac{1}{2}$ ) one half to Joseph Winterbotham or his assigns; the name of company to be known as Bates Brothers Co. or such other name as may be agreed upon. The officers of said Co. will be as follows; Joseph Winterbotham, Pres., J. R. Winterbotham, V. Prest., A. J. Bates, Secy. & Treas., with a salary of (\$1200) twelve hundred dollars for 1st year and (\$1500) fifteen hundred dollars for 2nd year, provided business pays 15 per cent or over from its organization; W. O. Bates to be superintendent with a salary same as A. J. Bates, and the raise the 2nd year subject to same conditions. A. J. and W. O. Bates to devote their energies and inventions to the business same as they are now doing. This agreement to be in effect from the 28th day of January, 1888.

W. O. BATES.

ALBERT J. BATES.

JOSEPH WINTERBOTHAM."

In compliance with the terms of the agreement, a corporation known as the Bates Machine Company, the appellant herein, was organized, and at the first meeting of the directors, on February 28, 1888, officers were elected as therein provided for. In May, 1895, the Consolidated Steel and Wire Company (hereinafter called the "Consolidated") was engaged in the manufacture of wire, barbed wire fencing and other wire products, one of its plants being located in Joliet. John Lambert was vice-president and general manager of the company, and Cory E. Robinson was manager of the Joliet mills, and salesman for the company at its general office in Chicago. About that time there were certain negotiations between A. J. Bates and Robinson concerning the invention of a woven wire fence and the invention and construction of a machine to manufacture it. Bates having undertaken to design such a fence, Robinson placed an order with the Bates Machine Company to construct a machine to manufacture the same. This order is as follows:

"JOILET, ILLINOIS, May 28, 1895.

BATES MACHINE COMPANY:

Please enter my order for one Automatic Woven Wire Fence Machine for making a woven wire fence 58" high, of a design like that shown on blue print attached hereto.

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The machine throughout to be built according to the design and plan of A. J. Bates, of Joliet, Ill., and under his direction, and I agree to pay for the machine as follows:

Fifty cents per hour for the labor thereon and three cents per pound for castings, and all other material, such as brass and steel, to be at the usual market price.

Payments to be made about the fifteenth of each month for all work done and material furnished for the month previous. Said machine to be built at the earliest possible date, and all patterns and designs for same to accompany and be delivered to the undersigned as his exclusive property.

It being distinctly understood that you are to make no machine or machines for making this woven wire fence for any other parties without my written consent.

CORY E. ROBINSON."

"Accepted.

BATES MACHINE Co.

A. J. Bates, Secy."

This order was filed in the office of the Bates Machine Company and was numbered 6342. At that time A. J. Bates, as secretary and treasurer, had the right under the by-laws, to make contracts for the Bates Machine Company with third parties. On May 30, 1895, Robinson and A. J. Bates entered into an agreement to organize a corporation for the purpose of manufacturing and marketing woven wire fence, with a capital stock of \$100,000, to be subscribed for by the parties in equal amounts, with a provision, however, that the wife of each should hold one share. It was further agreed therein that Bates should invent, design and patent a machine for the manufacture of a woven wire fence, substantially of a design shown by drawings attached thereto; that such machine should be manufactured at the works of the Bates Machine Company, upon the order and at the expense of Robinson, and when completed be turned over to said corporation in part payment of his subscription to the capital stock; that Bates should obtain a patent upon the application already filed by him for said woven wire fence, if it should be found patentable, and improvements thereon, and turn the same over also to said corporation; that the patents and designs so obtained or made by him should be

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received as payment in full for the stock subscribed for by himself and his wife. Work progressed on the machine under order No. 6342 until, although not fully completed, it was able to turn out a sample of the fence designed by Bates. This fence was tested about the 20th of December, 1895, and found to be a failure. The machine was therefore never completed, though the work done upon it was paid for by Robinson. A patent, number 561,194, was, however, taken out on the fence on June 2, 1896. On June 29, 1895, a license to receive subscriptions to the stock of the corporation styled the Standard Railroad and Farm Fence Company (hereinafter called the "Standard"), which was the corporation contemplated by the agreement between Robinson and Bates of May 30, 1895, was issued from the office of the Secretary of State and the stock subscribed by A. J. Bates, Ellen Bates and Robinson. The final certificate of incorporation of this company was issued October 5, 1895, but was never recorded in the office of the recorder of Will county. In July, Robinson and Bates leased a building, purchased machines for the manufacture of wire nails and barbed wire, and prepared to commence business. About August 1, 1895, Lambert, the vice-president and general manager of the Consolidated, became interested in the enterprise of Robinson and Bates and purchased one-fourth of the stock of the Standard Company. Lambert interested other officers of the Consolidated in the project to purchase the property of the Standard and the patents controlled by Bates and Robinson. The result was a written contract, dated September 14, 1895, by which the Standard sold its property to the Consolidated for \$40,000 cash, and the Consolidated agreed to cancel a certain contract it had with the Standard for wire and to assume a certain contract for wire which the Standard had with another company. It was further agreed the Standard should construct the woven wire fence machine heretofore mentioned and at its completion notify the Consolidated, and if, after thirty days successful operation of the machine, its workings should prove satisfactory to the officials of the Consolidated, "said device,

improvements and patents, such as may be obtained for both machine and its product," should be assigned to the Consolidated, which should become the absolute owner of the same, and should then pay the further consideration of \$40,000 in cash to the Standard; also that until the completion of the machine A. J. Bates should be in the employ of the Consolidated at a salary of \$4,000 a year, for which he was to give his entire and exclusive attention, services and skill to the early completion and perfection of said machine and the business of the Consolidated; that if, after a final inspection of the above mentioned machine by the officials of the Consolidated, they should decide it was not to their interest to purchase the same, then all rights under the contract should cease and the machine revert to the Standard. The option contained in the above contract was subsequently extended to the Consolidated to the 25th day of July, 1896. On September 25, 1895, at a special meeting of the board of directors of the Bates Machine Company, Albert J. Bates resigned his office as secretary and treasurer, which he had held from the formation of the company, and was appointed consulting engineer of the same at a salary of \$100 a month. Immediately after the failure of the first fence was demonstrated, A. J. Bates conceived the idea of another to obviate the imperfections of the first and proceeded to make a specimen of it by hand, which he exhibited to Robinson. It was thereupon agreed between Robinson and Bates and the Consolidated that he should proceed with the construction of a machine to manufacture the new fence. The new fence was subsequently patented on June 2, 1896, the patent number being 561,193. On January 7, 1896, A. J. Bates made an entry on the order book of the Bates Machine Company as follows:

"7072, drawings for woven wire fence machine.

7073, patterns for woven wire fence machine.

7074, castings and machine work for woven wire fence machine."

Work under these orders was prosecuted by the Bates Machine Company, and on June 12, 1896, the Consolidated

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was notified by A. J. Bates that the machine was completed and ready to stand the test of thirty days prescribed in the contract of September 14, 1895. About July 3, 1896, W. O. Bates caused a notice to be served on the Consolidated that the Bates Machine Company claimed rights and interests in the machine and the patent for the fence. The test of the machine terminated on the 12th of July, and it was then loaded upon cars of a railroad company for shipment. It was not delivered, however, by the railroad company, for the reason that W. O. Bates about that time notified it not to do so. On July 17th Robinson commenced an action of replevin in the Circuit Court of Will County against the railroad company to recover the machine. On account of the complications above referred to, the Consolidated required some guaranty of title to the machine and patent before paying the \$40,000 provided for by the contract of September 14, 1895. Therefore, on July 25, 1896, an agreement was entered into by which Albert J. Bates, Robinson and the Standard, obligated themselves to do certain things in favor of the Consolidated, in reference to the fence machine of patent No. 561,193 and its product, and the said A. J. Bates guaranteed and indemnified the Consolidated to the extent of \$20,000 against any claim of the Bates Machine Company or any one else in, to or against said machine or the title to the invention therein, or in its product. An attempt was made to settle and adjust all differences between A. J. Bates and the Bates Machine Company, resulting in an agreement dated September 10, 1896, which, after reciting the matters of difference between them, provided that the Bates Machine Company should relinquish any right to demand from said Albert J. Bates any interest in any invention which he might make after that date, except as to improvements upon certain machines then in existence, and that as to all inventions of every kind which Albert J. Bates might thereafter make, said writing of January 23, 1888, was abrogated, annulled and canceled; and as to the woven wire fence machine, and the patent for said woven wire fence in ques-

tion here, and a certain wire barbing machine, said writing should be and remain in full force and effect; that the intent of said instrument was "to permit said Albert J. Bates to contest the right of said Bates Machine Company to any right or interest in said inventions, and to permit said Bates Machine Company to insist upon a right to, interest in, or use of said inventions, and to use for such purpose said writing of date January 28, 1888." The agreement contained an option in favor of the Bates Machine Company, by which it could select for the purpose of the contest, either said woven wire fence machine or a certain other machine; but as said company afterward selected the woven wire fence machine, under the option given it, we may treat the contract as though referring to that machine alone. This agreement left to be contested in the courts the question of the ownership of, or the right to use, the following inventions: 1, woven wire fence patent No. 561,193; 2, the woven wire fence machine; and 3, the invention for a machine for barbing wire. On January 21, 1897, the Bates Machine Company filed its bill of complaint against A. J. Bates, C. E. Robinson and the Consolidated Steel and Wire Company, setting up the contract of January 28, 1888, and praying that specific performance be decreed against A. J. Bates, and that he be compelled to assign to complainant all patents which may be issued in the future or which may have been issued in the past, upon the three inventions last mentioned, or that he be decreed to grant an irrevocable and exclusive license to complainant to use such inventions, and that Robinson and the Consolidated be required to assign to complainant any interest they may have acquired in the same. There was also a prayer for an injunction against the defendants to the bill, and the usual prayer for summons. Answers were filed by the defendants and afterward the Consolidated filed its cross-bill against the Bates Machine Company, as the sole defendant, setting up its claim to the patents for the wire fence and machine to manufacture the same, and alleging that the defendant therein was engaged in building certain of said



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machines for another company, and that the same, after completion, would be removed out of the jurisdiction of the court. There was a prayer for temporary injunction against the removal of said machines, and also for perpetual injunction against the Bates Machine Company from any further construction or work upon said machines; from delivering them to the company said to have ordered them; from making or using them or like machines; from making any machines in violation of said contract of May 28, 1895; from asserting any right to the patent for said machine; and praying that the machine already constructed be delivered up to complainant in the cross-bill to be destroyed, and that complainant might have such other and further relief as the nature of the case demanded. An answer was filed to said cross-bill by the Bates Machine Company, and the latter afterward filed a supplemental and amended bill making certain additional allegations in support of its claim. Upon a trial of the cause the court entered a decree dismissing the original bill for want of equity. It also found for the complainant in the cross-bill and enjoined the Bates Machine Company from any further construction or work upon the machines mentioned therein, as being under contract to other parties than the complainant in the cross-bill; from delivering said machines, and from making, or making any use of, the same or like machines. It was further decreed by the court that the complainant in the cross-bill was the owner, both in law and in equity, of patent No. 577,639, which is the patent for the fence machine as originally designed, No. 591,996, the patent for the improved machine, and No. 561,193, the patent for the woven wire fence. From this decree the Bates Machine Company has appealed to this court.

The first question presented for our consideration by the record in this case is, whether the contract of January 28, 1888, entered into between Albert J. Bates, W. O. Bates and Joseph Winterbotham, who subsequently organized the Bates Machine Company, is such a contract as a court of equity will enforce in favor of the said company against

Albert J. Bates. The law is well settled that specific performance of a contract can not be demanded as a matter of absolute right in either party, but that applications for the same rest within the sound legal discretion of the court hearing the case. Inflexible rules can not be laid down for the exercise of this power, but before a court of equity will compel the specific performance of a contract it must appear that it is founded upon a good and valuable consideration, and is reasonably fair and just in all its parts.

A court of equity will not lend its aid to give a party the benefit of an unreasonable or unjust contract, the enforcement of which would work a serious hardship. *Hetfield v. Willey*, 105 Ill. 286; 22 Am. Ency. of Law, 910.

The contract provided that said A. J. and W. O. Bates should "put in their entire business, book accounts, notes, machinery, patterns, stock, etc., manufactured and unmanufactured; also all patents now in existence and all inventions hereafter made by either the said A. J. or W. O. Bates." It was further provided therein that A. J. and W. O. Bates should "devote their energies and inventions to the business, same as they are now doing." The contract constituted in effect an agreement on the part of A. J. and W. O. Bates to assign to the corporation proposed to be formed any inventions they might thereafter make. It was without limit as to time, and was an attempt to secure to the corporation the result of all the future labors and investigations of the parties named, so far as inventions were concerned. Such attempts to bind all future products of a man's brain are not regarded favorably by the courts.

The United States and State courts, it may be said, draw broad distinctions between an obligation to assign inventions or improvements upon an existing thing, which the assignor has already assigned, and a mere obligation to assign, in gross, inventions of any kind and character whatsoever, thereafter made. In the former case the courts have as a rule sustained the contract. This is well illustrated by the case of *Berkery Mfg. Co. v. Jones*, 71 Conn. 143, the opinion in which is cited at length by counsel for appellant. In that

case the defendant, Jones, entered into a written agreement with the plaintiff, the Berkery Manufacturing Company, to assign to it all his right, title and interest in and to the three inventions mentioned in the agreement; Jones also agreed that if at any time in the future, during the life of said corporation, he "should discover or invent any other or further improvement in said improvements specified in said letters patent, already issued and pending, or any invention or improvement in any other article which said corporation is engaged in manufacturing," he would assign the same to the corporation, "so that all right, title and benefit to the same shall inure to said corporation and its successors without cost or charge of any kind to said corporation for the same." It appears that after the contract was made, during the life of the corporation, and while it was engaged in the manufacture and sale of ball-cock valves, Jones invented a new and useful improvement in the same, to secure which a patent was issued to him, and the question was whether that invention came within the obligation of his written agreement. It was held that the invention was an improvement in the article which the corporation was engaged in making, and which it was especially organized to make and sell, and that therefore the invention in question clearly came within the class which he had agreed to assign. The contract was accordingly sustained.

In that case the agreement was limited to inventions made during the life of the corporation, and to improvements upon patents already issued or pending, and to inventions and improvements upon articles which the corporation was engaged in manufacturing. There are no such limitations in the contract in question in this case, however, and therefore a different rule applies. In the case of *Aspinwall Mfg. Co. v. Gill*, 32 Fed. Rep. 697, it was said by Mr. Justice Bradley, of the Supreme Court of the United States, then sitting at the Circuit, where the question arose concerning an agreement covering future inventions without limitations or qualifications, that "a naked assignment or agreement to assign, in gross, a man's future labors as an

author or inventor—in other words, a mortgage on a man's brain, to bind all his future products—does not address itself favorably to our consideration.”

In *Palace Stock Car Co. v. Stable Car Line*, 142 Ill. 315, it was said by the Supreme Court of this State, in speaking of an agreement to assign future inventions, “we but hold with other courts when we say that an agreement to assign, in gross, the results of an inventor's future labors and investigations should not be liberally construed as against such inventor,” and the court thereupon cites approvingly the case of *Aspinwall Mfg. Co. v. Gill*, above referred to.

The same question was involved in the case of *McFarland v. Stanton Mfg. Co.*, 53 N. J. Eq. 649. In that case the language of the contract contained a provision for the assignment of future inventions as follows:

“Including all letters patent of the United States now granted or applied for, for the same, or that may hereafter be applied for, including any and all improvements for or about the same or pertaining to the art of naphtha soap making.”

In the opinion it was said by the court:

“The assignment of future improvements upon a machine in connection with the assignment of the patent for such machine is valid. A naked agreement to assign in gross a man's future labors as an inventor is not good. But where a man purchases a particular invention, secured by patent, which is open to indefinite improvement, he may stipulate for the sale of future improvements he may make upon it. The subsequent patent, to be within the terms of the contract, must be an improvement upon the original invention.”

It appeared from the evidence that the book accounts, machinery, etc., which the Bates Brothers turned over to the corporation, were inventoried at about \$10,000, and that Winterbotham put in \$10,000 in money. The Bates Brothers contributed one-half of the assets of the enterprise and received one-half of the stock of the corporation, Winterbotham contributing the other half of the assets and receiving the other half of the stock. A. J. Bates was, by the contract, to be appointed secretary and treasurer, with a salary of \$1,200 for the first year and \$1,500 for the second

year, "provided business pays fifteen per cent or over from its organization," and W. O. Bates was to be superintendent, with the same salary. A. J. and W. O. Bates were also to "devote their energies and inventions to the business, the same as they are now doing." There was nothing in the contract to bind the company to retain them as officers or pay them salaries after the second year. At the end of that time they could be deprived of both their offices and salaries; yet if the contract was a valid one they must still devote their energies and inventions to the business to the same extent as before. There was no consideration for this undertaking on their part, no counter undertaking on the part of Winterbotham, and it was therefore entirely lacking in mutuality.

We are consequently of opinion that the complainant in the original bill is not entitled to a specific performance of said contract against A. J. Bates in regard to the patents in controversy, for the reason that in such respect it was unreasonable and wanting in mutuality, and its enforcement would work a serious hardship on him. The court below therefore properly dismissed the original bill for want of equity.

But even if the contract was a good and valid one, as between the Bates Brothers and Winterbotham, could it in equity be enforced as against Robinson and The Consolidated Steel and Wire Company? The patents with which they are concerned are No. 561,193, for the woven wire fence, and Nos. 577,639 and 591,996, which are the patents on the original machine to manufacture such fence and the improvement thereon. Robinson testified that he had for several years prior to the time he made the contract with A. J. Bates of May 30, 1895, been talking to the officers of the Consolidated and trying to get them to go into the woven wire fence business "as the coming business," but that they did not take kindly to his remarks; that he also talked with A. J. Bates about "woven wire fence and a machine to make it fast and cheap;" that finally Bates came to him and said he had in his mind a plan for such a fence and a machine to build it; that he examined the fence

and soon afterward went into the contract with Bates above referred to. A. J. Bates testified to conversations with Robinson concerning the matter, and that prior to the making of said agreement with Robinson he had never designed or invented a woven wire fence, or machine for making the same. This testimony is not contradicted. As a result of the conversations between Robinson and A. J. Bates the agreement of May 30, 1895, was entered into providing for the formation of the "Standard" corporation, for the purpose of manufacturing and marketing woven wire fence, for the patenting of the design for the fence and a machine for manufacturing the same at the expense of Bates, for the manufacturing of said machine at the expense of Robinson, and for the assignment of all patents and designs of said corporation when formed.

There is no evidence that Robinson knew of the contract of January 28, 1888, between the Bates Brothers and Winterbotham, and there was no reason why he could not have entered into the contract he did with A. J. Bates. The suggestion as to the making of woven wire fence came from Robinson, and he had a right to employ Bates to make a design for the same and a machine to construct it. It was entirely proper for Robinson to contract for this work, with the understanding that it should belong to the proposed corporation when completed. The order for the construction of the fence machine of May 28, 1895, was signed by Robinson, who agreed to pay for all the work, and contained a provision that all patterns and designs were to be delivered to him as his exclusive property, and that no machine or machines for making such fence were to be made for any other parties without his written consent. This order was accepted by the Bates Machine Company through A. J. Bates, its secretary, who, it is conceded, had the power to make contracts for such company.

A. J. Bates testified that his brother, who had charge of the work constructed by the company, entered the order in the book himself; that the latter knew A. J. Bates was negotiating with Robinson, but made no complaint what-

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ever about the terms of the contract, and was satisfied and glad to get the work; that he said nothing about the contract being unusual.

W. O. Bates testified that Robinson told him he had decided to give the Bates Machine Company the order, and he hoped "we would do all we could to rush it for him as soon as possible." "I told him we would do all we possibly could to build it as soon as possible." W. O. Bates further testified that he complained to A. J. Bates about the order, but his only objection seemed to be a fear that under it the company would not be entitled to build all the machines Robinson might want. It does not appear that he made any objection to Robinson's ownership of the patterns, designs, or machine. The expenses connected with the construction of the machine were charged to and paid by Robinson. For a time even the services of A. J. Bates were charged to Robinson, but when this was discovered by Bates he complained of that charge, for the reason that he was interested in the Standard, and the charge was withdrawn. It also appears that Robinson was charged for the services of one Hutchins, a former solicitor of patents, who was then in the employ of the Bates Machine Company, who made the drawings for the patent of the machine, and drew the specifications for both patents. It is not reasonable to suppose that if the Bates Machine Company expected to claim the patents it would charge Robinson for the services of its draughtsman in making these drawings and specifications.

The first fence designed by Bates proved a failure, and the machine for making the same, the work upon which had been paid for by Robinson, and was nearly completed, was abandoned. No new order in writing seems to have been given for the second machine, but A. J. Bates made entries Nos. 7072, 7073 and 7074, above referred to, upon appellant's order book, for drawings, patterns, castings and machine work "for woven wire fence machine." He testified that he entered these orders merely to separate the cost of the new machine from the old one, and to divide

the cost of the different classes of work on the new one. The work appears to have been prosecuted under the terms of the original order of May 28, 1895. In the meantime the Consolidated had purchased the interest of Robinson, A. J. Bates and the Standard in and to said inventions, and contracted to pay A. J. Bates a salary for his services, which fact was known to appellant through its officers. Notwithstanding this knowledge, appellant continued the work of manufacturing said machine and receiving pay therefor. Whether the order for the machine which was made to construct the successful fence is to be treated as part of and a continuation of the original order, or as a new and independent order, is, in our opinion, unimportant, so far as the Consolidated is concerned. In either event the various facts and circumstances in evidence, above referred to, estop appellant from claiming the patents, as against said company.

It may be further noted that the first fence was tested and found worthless about the 20th of December, 1895; that thereupon A. J. Bates proceeded to make other designs, and that the entries on the order book of the Bates Machine Company, in reference to the same, were made January 7, 1896. Previous to that time, at a special meeting of the directors of the Bates Machine Company, held September 25, 1895, only a few days after the Standard had sold out to the Consolidated and A. J. Bates had become an employe of the latter, said Bates resigned his office as secretary and treasurer of the Bates Machine Company, was appointed consulting engineer at a much smaller salary, and thereafter appears to have devoted himself to the completion of said patents under his contract with the Consolidated.

W. O. Bates was elected secretary and treasurer in his place. This arrangement very materially changed the relations of the parties provided for by the original contract between the Bates Brothers and Winterbotham, and, if it did not constitute a virtual abandonment of the same, was such a change as to render it unreasonable that the Bates Machine Company should thereafter be permitted to enforce it in the manner it is sought to be enforced in this suit.



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It is said that the Consolidated is not an innocent purchaser of said patents, and should not be held to be entitled to them, for the reason that it paid the second \$40,000 provided by its contract with the Standard, A. J. Bates and Robinson after notice was served upon it, by the Bates Machine Company, of its claim to the same. The machine had been completed on June 12, 1896, while this notice was not served upon the Consolidated until July 3d following, when the test of the machine was in progress. Up to that time the Bates Machine Company had made no claim to the patents, while it had permitted Robinson and the Consolidated to pay large sums for the construction of the machine. The Consolidated had also paid \$40,000 and incurred other debts under the same contract, which included the sale to them of the patents. It would not be equitable to permit the Bates Machine Company to receive pay for its work from parties who, to its knowledge, claimed the patents, and when the work was done, for the first time, set up its claim. It had by its actions already estopped itself as against the Consolidated from claiming the patents.

We are therefore of opinion that the cross-bill of the Consolidated Steel and Wire Company was properly sustained, and that there was no error in the decree in reference to the same.

For the reasons above given, the decree of the Circuit Court will be affirmed.

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**Serena Luther v. Henry Luther.**

1. **DIVORCE—Proofs Must Sustain the Bill.**—In a suit for divorce, where the evidence is conflicting and the preponderance is not with the complainant, the allegations of the bill can not be said to be sustained and it is properly dismissed.

**Divorce.**—Error to the Circuit Court of Iroquois County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

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MORGAN & OREBAUGH, attorneys for plaintiff in error.

J. W. KERN, attorney for defendant in error.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a bill for divorce, filed by plaintiff in error against her husband, the defendant in error, charging him with extreme and repeated cruelty.

The bill charged that soon after their marriage, defendant in error commenced a systematic course of persecution and ill-treatment toward plaintiff in error, which has continued throughout their married life, and further alleged four separate and distinct acts of physical violence committed by defendant in error upon her person. Upon the hearing the court below entered a decree dismissing the bill for want of equity, and dissolving a temporary injunction which had been previously granted. Upon the trial, plaintiff in error testified to five acts of violence committed against her by defendant in error. The acts testified to by her were of different degrees of seriousness, only one of them being sufficiently grave to cause her any noticeable degree of physical pain. Upon every occasion but one, when the difficulties are alleged to have occurred, the two were alone together, and the act of violence is affirmed by plaintiff in error and denied by defendant in error. The one act to which there were witnesses is the most serious one complained of. On that occasion Mrs. Luther testified that she wished to put one of the children to bed, and upon attempting to take it for that purpose Mr. Luther seized her by the wrists, twisted her arms and pushed her into a corner of the room; that the force used by him was such as to discolor the flesh of her wrist and render her arm lame for three days. On the other hand, Mr. Luther testified that his wife insisted upon taking the child to bed at once; that he remonstrated with her and attempted to detain it because he had given the child permission to sit up a while after supper; that she thereupon caught him by the throat, leaving the imprint of her finger nails across it, and when forced to let go struck

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at his face with her fist. A witness, Howard Russell, who stood outside of the house, corroborated Mrs. Luther to some extent, stating that he guessed Luther struck her, "from the looks of things," while a young man, Bert Miner, who was with Russell, substantially corroborated Mr. Luther's statement, and testified to seeing a red mark on the latter's neck after the trouble was over. The only other witness to this transaction was Miss Eade, a sister of Mrs. Luther, who was at work in the kitchen adjoining when the trouble occurred. She testified that her sister had told her she was going to put the child to bed and that she, witness, thought he would object to the child going to bed, as he had said so before; that the door was open between the kitchen and sitting room, and that she saw him grab his wife by the wrist and push her in the corner; that she, witness, immediately went in and said, "I saw it all."

It appears, however, from the testimony of two witnesses, that Miss Eade had said in their presence that she had come to this country for a purpose, and when she went away she would take her sister with her. It also appears from the testimony of another witness, Mrs. Foreman, that after this occasion, and shortly before the separation, Mrs. Luther told her that her husband had never struck her, but that she hoped he would, so that she would have ground for a divorce. There can be no doubt but that the married life of this couple was an unhappy one, and it is probable that they had long ceased having any considerable regard for each other, but we can not say from the evidence that Mr. Luther was entirely responsible for this condition of affairs.

It appears Mrs. Luther was accustomed to go to parties and entertainments and remain out late at night without his consent and against his objection; that her conduct with another man, concerning whom there had been trouble between herself and her husband, was so indiscreet as to have become the general talk of the neighborhood, and that her husband had been notified of that fact.

It therefore appears that she was not without fault on her part, and that she was at least equally to blame with

her husband for the difficulties which arose between them. Some of the evidence, indeed, tends to show an intention on her part to provoke trouble in order that she might get a divorce. However that may be, it is sufficient to say that the evidence in the case was conflicting and the preponderance does not appear to have been with the plaintiff in error. The judge who heard the case and saw the witnesses upon the trial in the court below, was of the opinion the allegations of the bill were not sustained, and we discover in the record no reason for disturbing his findings.

The decree of the Circuit Court will be affirmed.

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### U. J. Trimble, Adm., v. Juda Wheeler.

1. EVIDENCE—*Unexecuted Leases, When Admissible.*—A written lease prepared by the parties, but not executed by them, is competent evidence, and properly admitted for the purpose of showing what the parties considered the fair rental value of the premises described in it.

*Assumpsit, for services, etc.* Appeal from the Circuit Court of Bureau County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

ECKELS & KYLE, attorneys for appellant.

SCOTT & DAVIS, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This suit arose upon a claim for \$798 presented by appellee in the County Court of Bureau County against the estate of her mother, Mary Brewer, deceased, for "extra care and keeping" from April 1, 1888, to August 30, 1894.

The county judge having been of counsel for claimant this cause was certified to the Circuit Court and there tried by a jury. There was a verdict for the claimant for \$339, and a motion for a new trial having been denied, judgment

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was entered for that amount. Appellant, who was the agent of deceased from 1884 until her death in 1894, and is now administrator of her estate, testified that he made a contract with claimant and her husband to take care of Mrs. Brewer for the use of the latter's house and twenty-seven and one-half acres of land which she owned, the rental value of which was about \$15 a month. Claimant, on the contrary, denied that such a contract was made. It is not denied that during the time covered by the claim, appellee took care of and supported deceased. The latter was an old woman, partially disabled, and it is clear from the evidence that for at least a part of the last years of her life, it was worth much more to care for her than the use of the house and land. The evidence, both as to the making of the contract and the value of the services rendered by complainant, was conflicting, but we think it was sufficient to support the verdict and that substantial justice has been done.

It appeared from the evidence that prior to the time appellee and her husband moved upon the premises in question, the latter had a conversation with appellant concerning the renting of the same, offering to give therefor the sum of \$12 a month. Appellant, after having consulted with Mrs. Brewer, agreed to the terms proposed and drew up a written lease to that effect, which he afterward submitted to appellee and her husband. Some further conversation, however, took place between the parties at that time and the lease was not signed. This unsigned lease was offered in evidence by appellee and admitted by the court against the objection of appellant. The latter insists that in admitting the lease the court erred. We think the lease was competent evidence and properly admitted for the reason that it was prepared by appellant as agent of Mrs. Brewer and tended to show what the parties considered the fair rental value of the premises.

We find in the record no reason for reversing this judgment, and it is therefore affirmed.

**Francis Egan, Adm. de bonis non, etc., v. Mima B. Clark.**

1. ADMINISTRATION OF ESTATES—*Duty of Administrators*.—It is the duty of an administrator to attempt to collect the debts apparently due the estate, and not to resist their collection by setting up defenses against them. He should not depreciate the estate, but seek to collect its assets, leaving its apparent debtors to present their defenses, if any.

2. SAME—*Duty in Relation to Bad Debts*.—An administrator is not required to waste the estate in attempts to collect bad debts, or where it is clear a perfect defense exists, but he must act in the utmost good faith to the estate.

**Administration of Estates**.—Appeal from the Circuit Court of Lee County; the Hon. JAMES S. BAUME, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed April 6, 1900.

C. H. WOOSTER and MORRISON & BETHEA, attorneys for appellant.

BARGE & BARGE, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Francis Egan, administrator of the estate of Helen Egan, deceased, filed his final report as such in the County Court of Lee County. Mima Barrie Clark, a daughter and heir at law of deceased, filed objections thereto, only one of which is involved in this appeal. That objection was that the administrator had not charged himself with a certain judgment for \$2,580.64, and interest thereon, recovered by Elizabeth Barrie against Alfred H. Egan and Michael Egan in the Circuit Court of Lee County, and afterward assigned by Elizabeth Barrie to Helen Egan. The County Court overruled the objection. Mrs. Clark appealed to the Circuit Court, where, on a hearing, the objection was sustained, and the administrator was ordered to proceed to collect the judgment. From that order the administrator prosecutes this appeal.

In 1872 Helen Barrie was a widow, having children, and among them appellee and Elizabeth Barrie; and Michael Egan was a widower, having children, and among them

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Alfred H. Egan. In that year Michael Egan and Helen Barrie were united in marriage. Before that marriage Michael conveyed a number of tracts of land and town lots owned by him to his children. In 1877 Alfred borrowed \$1,700 of his stepmother, and gave therefor a promissory note signed by himself as principal, and by his father, Michael, as surety. Thereafter Mrs. Egan assigned the note to her daughter Elizabeth Barrie, and a suit in the name of the latter was brought thereon against Michael and Alfred in the Circuit Court of Lee County, and the judgment here in controversy was rendered against the defendants by default. Afterward Elizabeth Barrie, being mortally ill, assigned said judgment to her mother, Helen Egan. Mrs. Egan afterward died. Francis Egan, brother of Michael Egan, was appointed administrator. He did not collect this judgment. The main question presented is whether he should be compelled to do so.

The administrator resists solely on the ground that before the suit was brought in the name of Elizabeth Barrie upon the note, the note itself was paid by the conveyance of a certain tract of forty-three acres of land, called "the Wasson forty." This was one of the tracts which Michael deeded to his children before his second marriage. In 1882 and 1883 the children of Michael Egan deeded several of said tracts to James Taylor (a relative) and Taylor and his wife made two or more deeds of said tracts to Helen Egan. By one of these instruments, executed in January, 1883, Taylor and his wife conveyed the Wasson forty to Helen Egan; and it is claimed by the administrator that the Wasson forty was conveyed to Helen Egan in payment of the \$1,700 note, but that Mrs. Egan afterward caused the note to be put in judgment in her daughter's name in order that it might be collected from Alfred, the principal, for the benefit of Michael, her husband, the surety.

It is the duty of an administrator to try to collect debts apparently due the estate, and not to resist their collection and set up defenses against them. He should not depreciate the estate committed to his trust, but should seek to preserve and collect its assets, leaving to those who seem to

be its debtors the task of bringing forward and proving their defenses, if any they have. (2 Woerner's American Law of Administration, Sec. 324.) The administrator is not required to waste the estate in attempts to collect bad debts, or demands to which it is clear a legal defense exists, but he must act in the utmost good faith to the estate. This judgment appeared upon its face to be a valid demand in favor of the estate, and the administrator had within his control property sufficient to at least partially pay it. The claim that no debt was in existence when the suit was brought and judgment was rendered came from interested sources, and the administrator should have tried to enforce the judgment. The court below properly directed him to do so.

When we first decided this case we held the court below erred in further deciding the debt was not paid, and requiring the administrator to apply upon the judgment the funds in his hands as Michael Egan's distributive share of Helen Egan's estate, because Michael Egan was not in court to defend his rights. Upon further consideration we conclude that position untenable. Section 112 of the administration act requires notice to the heirs before the County Court acts upon a final report of an administrator. As the County Court acted upon this final report, the presumption is that the heirs, including Michael Egan, had the notice without which the County Court was not authorized to act. If he had notice, he had the opportunity to appear and protect his interests if he desired. Indeed, appellant in his brief says, "the issues may be treated as though Michael and A. H. Egan were the actual parties in the case." The grounds upon which we originally held a portion of the order appealed from erroneous were therefore untenable. As the judgment was entered by us during the last vacation we conclude it is within our power to correct and modify it at this term.

Did the court below rule correctly in directing the application of Michael Egan's distributive share of the estate as a payment upon the judgment? In such matters the County Court acts upon equitable principles. Would equity



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grant Michael Egan relief against this judgment? The Wasson forty was conveyed to Helen Egan in January, 1883, and the alleged payment was by that conveyance. On May 27, 1885, Elizabeth Barrie brought suit against Michael and Alfred H. Egan upon the note. Summons was served upon defendants on May 30, 1885. They did not defend. On April 30, 1886, judgment against them was entered for the amount of the note. They had their day in court, when all the facts were fresh in the memory of all parties, and when all parties, who knew the facts, were living. They did not avail themselves of their legal right to plead and prove that the note sued upon had been paid. Three children of Michael Egan by his first wife, and his brother, the administrator, now testify to conversations with Helen Egan, which, if correctly understood and reported, tend strongly to show the deed to her of the Wasson forty, paid the note in question. On the other hand James Taylor (through whom the title passed to Helen Egan) and his wife testify the Wasson forty was conveyed to Mrs. Egan in payment of other specified debts of Michael and Alfred. Even if equity would interfere merely because of payment before suit brought, it would be very dangerous to allow a judgment to be made void upon such proof. Conversations had years before may easily be partially forgotten or misreported. The note was not surrendered when the alleged payment was made. The failure to defend is inconsistent with the supposed payment. The evidence as to whether the Wasson forty was deeded to pay this note or other debts is conflicting. The testimony of the administrator is inconsistent with a letter he wrote in 1896, in which he treated the judgment as valid and binding upon Michael Egan. The judgment was recovered in 1886. This attack upon it seems not to have been made till 1898, after Mrs. Egan's death. *Laches* should now prevent a resort to equity to defeat the judgment. But a court of equity will not enjoin the collection of a judgment merely upon proof the debt was paid before the suit was brought. It must further appear that defendants in the judgment were prevented by fraud, accident or mistake, from plead-

ing the payment as a defense in that action. There is no such proof in this case. Two witnesses testify to conversations of Helen Egan, tending to show she devised the plan to put the note in judgment in order to compel Alfred to pay it for the benefit of Michael, but there is no proof either Michael or Alfred were parties to the plan, or were in any way misled, deceived or prevented from pleading and proving the payment. We are of opinion a court of equity would not interfere in behalf of Michael or Alfred H. Egan to set aside the judgment, upon the proofs in this record. There is therefore no equitable reason why it should not be enforced. Our former judgment will accordingly be so modified as to wholly affirm the order of the Circuit Court. Order affirmed.

### Robert Dady v. James M. Condit.

1. *RES ADJUDICATA*.—On *Second Appeals*.—On the second appeal from the trial court all questions considered on the first appeal must be regarded as *res adjudicata* in the subsequent proceedings in the case.

2. *TRIALS*.—*Viewing the Premises*.—In estimating the damages based upon the evidence and their view of the premises in question, the jury have a right to take into consideration their location, situation and surroundings, as seen by them when viewing the land.

*Assumpsit*, to recover damages for the breach of a written contract for the sale of real estate. Appeal from the Circuit Court of Lake County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

GEORGE W. BROWN and COOKE & UPTON, attorneys for appellant.

It is error to permit the jury to go upon and view other premises than those in controversy in the suit. And knowledge of such improper view and proceeding with the trial thereafter does not waive the error. *Tedens et al. v. Sanitary District*, 149 Ill. 87.

87	250
m104	507
s104	509

87	250
s209a	488

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HOYNE, O'CONNOR & HOYNE, attorneys for appellee.

JOHN L. GRIFFITHS and CLARKE & CLARKE, of counsel.

Where the jury viewed the premises and the evidence is conflicting, the court will not disturb the verdict. *R. I. & P. Ry. Co. v. Leisy Brew. Co.*, 174 Ill. 547.

Unless it is so manifestly contrary to the preponderance of the evidence as to indicate misconduct on the part of the jury. *W. Chicago City Ry. Co. v. Chicago*, 172 Ill. 198.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of assumpsit by appellee against appellant, to recover damages for the breach of a written contract for the sale of real estate near the city of Waukegan. The controversy between these parties, arising out of the same transaction, was before us on a former appeal, when the contract in question and the facts relating thereto were fully stated and considered. *Condit v. Dady*, 56 Ill. App. 535; see also *Dady v. Condit*, 163 Ill. 511.

The opinions in the cases cited contain a full statement of the contract and the facts, and we deem it unnecessary to here again detail them.

The declaration in this case contained special counts upon the contract and also the common counts. The defendant pleaded the general issue. There was a trial by jury resulting in a verdict in favor of appellee for \$15,000. The plaintiff entered a remittitur for \$3,000 and the court rendered judgment against the defendant for \$12,000, after overruling a motion for new trial. The defendant prosecutes this appeal, and errors are assigned as to the rulings of the court upon the admission and rejection of evidence and also as to its action on the instructions.

It appears from the evidence that appellee tendered payment according to the contract, and also the mortgage to secure the deferred payments, as specified therein, and, in short, performed all that was required of him to be done under the contract, and demanded a deed.

Appellant absolutely refused to carry out the contract and appellee brought this suit to recover damages.

Appellant then brought a suit in equity to enjoin the prosecution of the suit at law, in which he set up charges of fraud in procuring the contract, and we think all the defenses relied on in this suit.

These defenses were all fully considered by this court and by the Supreme Court in the cases above cited, and the controversy was decided against the present appellant, and those questions must now be regarded as *res adjudicata*. This being so, the only question for consideration on the trial of this cause was as to the plaintiff's damages, and the amount he ought to recover. This was a question of fact for the jury, and unless there were errors of law committed on the trial the judgment must be affirmed. The judgment is large, and the importance of the case has demanded and received our careful consideration.

We fail to find any serious errors in the rulings of the court on the introduction or rejection of evidence. We do not deem it necessary to discuss in detail the various points made, as no important principle is involved, but content ourselves with holding that there was no reversible error in the action of the court upon the evidence.

The first instruction complained of is numbered two in the series given for the plaintiff, and in effect tells the jury that they should estimate the damages to be allowed the plaintiff without regard to what amount of damages might have been recovered by the defendant had the situation of the parties been reversed—that is, if the plaintiff had refused to perform and the defendant had brought suit to recover damages for a breach of the contract by the plaintiff. It is said this brings into the case an issue not involved in the trial. In one sense this may be true, because in no view of the case could Condit have recovered any damages in this suit, but nevertheless we think the instruction contained a correct proposition of law, and it was not error to give it.

Complaint is also made of instruction numbered twelve, given for the plaintiff. During the trial of the cause the

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jury were sent out to view the premises, under the authority of *Springer v. City of Chicago*, 135 Ill. 552.

Referring to this view of the premises, the court gave to the jury the twelfth instruction, which is as follows:

"The court instructs the jury that the jury has been allowed to go out upon the premises in question for the purpose of examining the location, situation and general condition of the premises, and the situation, location and physical conditions of other property in the neighborhood, referred to in the testimony. In arriving at the verdict and the amount of damages, you should give plaintiff in this case your view of the premises in evidence in the case, but such view is only admitted for the purpose of throwing light upon the value of the premises in question on the first day of August, 1891, and you should not take into consideration your view for any other purpose, except as to the general location, situation, quality and condition of the premises in question, and the situation, quality and condition of other premises testified about, and the bearing of such things upon the market value of the premises in question August 1, 1891."

The objection made to this instruction is, that it tells the jury they were allowed to view the situation, location and physical conditions of other property in the neighborhood, referred to in the testimony. It is claimed that this was error, and the case of *Tedens et al. v. The Sanitary District*, 149 Ill. 87, is cited as sustaining this contention. But there is no evidence in the record before us that the jury were taken upon or permitted to view any other land than that in controversy in this suit. In that respect the case is distinguishable from the *Sanitary District* case. The jury could not be expected to view the land in controversy without seeing the surrounding lands, and they were not bound to close their eyes as to the location and quality of other lands in the immediate neighborhood. This was said in the case cited, and we understand the court there only to hold that the jury had no right to go upon and view other lands in the same manner and with the same purpose as they did the lands in controversy. We think the instruction under discussion simply meant, and could only be understood by

the jury as meaning, that in estimating the damages based upon the evidence and their view of the premises, they had a right to take into consideration their location, situation and surroundings, as seen by them when viewing the land. If so understood, and we think the jury could not have understood it otherwise, the instruction was not erroneous.

We think the thirteenth instruction is not subject to the objection urged against it, but if it is, the defendant's thirty-fifth instruction is subject to the same objection and he can not complain.

The instructions asked on both sides were numerous, and it would too greatly extend the limits of this opinion to discuss every objection to the action of the court in giving, modifying or refusing them. Suffice it to say we think the jury were fairly and fully instructed as to the law of the case, and while some of the instructions given were not entirely free from criticism, we are of opinion they were not sufficiently erroneous to require a reversal of the judgment.

Finding no substantial error in the record, the judgment must be affirmed.

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**The People, etc., for the use of, etc., v. John Courson et al.**

1. **PRACTICE—Order of Proofs.**—Where the acts of an agent are relied upon to make a case, proof of his authority should be made before evidence of his acts are admissible.

2. **SAME—As to Proceeds of Writs in the Hands of Other Officers.**—Where a constable holds a justice's execution against a person whose property is already in the hands of the sheriff under a prior execution from the Circuit Court, the proper practice is for the plaintiff in the justice's execution to apply to the Circuit Court for a rule on the sheriff to pay to the constable, after satisfying his prior writ, the amount called for by his execution.

3. **SAME—Proof of Acts of Agent Before Agency Proven, Not Admissible.**—It is improper practice to admit proof of the acts of an agent, till the agency has been proven.

**Debt, on a constable's bond.** Appeal from the Circuit Court of Knox County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

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MARVIN T. ROBISON and A. J. BOUTELLE, attorneys for appellant.

WILLIAMS, LAWRENCE & WELSH, attorneys for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Henry A. Swigert issued and placed in the hands of John Courson, a constable of Knox county, a distress warrant against the goods of Nellie C. Hall, for rent in arrear. The goods had already been seized by the sheriff of the county under an execution from the Circuit Court of Knox County, and were in his possession. Courson indorsed upon the warrant what may be called a paper levy. Such further proceedings were had before a justice of the peace that a special execution was issued to Courson commanding him to sell the goods so supposedly distrained. Courson retained the special execution more than eighty days, and Swigert then brought this suit before a justice of the peace upon the constable's official bond to recover the sum called for by said execution, under Section 9 of Article 16 of Chapter 79 of the Revised Statutes. The justice found for defendants, and upon appeal to the Circuit Court a trial by jury was had, and a verdict rendered and judgment again entered for defendants, and plaintiff prosecutes this further appeal.

The constable claimed he retained the special execution beyond the legal time for its return by the direction of Emanuel L. Swigert, son of plaintiff, and that Emanuel was plaintiff's agent in that matter. The court, against objections of the plaintiff, permitted proof of the directions given by Emanuel to the constable before there was proof of the agency. This was improper practice, and such a course tends to confusion in the trial, and puts into the minds of the jury proof which can not be readily removed if the preliminary proof fails. When offered, the evidence was incompetent, because it did not then appear Emanuel had authority from his father, and the objection should have been sustained, and defendants required to offer their pre-

liminary proof first, in a due and orderly manner. Some of the proof to establish the agency may also have been incompetent. But it finally appeared by the evidence of plaintiff and his son that each time Emanuel visited the constable he was sent by plaintiff to convey a message to the constable concerning this execution. The fact of agency was therefore established, and the former error was cured. Emanuel denies that he directed the constable to retain the execution, but we are of opinion that the preponderance of the evidence and the reasonable probabilities are with defendants on that question. Plaintiff and his son deny that Emanuel was authorized by his father to direct the plaintiff to hold the execution. But having been sent to convey a message from plaintiff to the constable concerning the execution, even if he exceeded his instructions, still plaintiff would be bound.

The constable never had these goods, and could not sell them under the special execution. In the reply brief plaintiff says that the fact (outside the record) is that after the sheriff had sold enough property to satisfy his prior writ, these goods described in the distress levy and special execution were left unsold. But the stipulated proof in this record, by which we must be governed, is that the sheriff sold all the goods, and had money enough to have paid this special execution after satisfying the prior writ held by him. In that state of the case there were no goods the constable could seize or sell. He did frequently seek money from the sheriff but did not receive it. A petition should have been filed or motion made in the Circuit Court from which the sheriff's writ issued, asking a rule on the sheriff, after satisfying his prior writ, to then pay the constable the amount called for by his special execution. We fail to see that it was the duty of the constable to go into the Circuit Court, prepare and present such a petition or motion, bring it to a hearing, present the proofs and secure such an order. He was not a lawyer. He could not do this work himself. If he hired a lawyer to do it, no mode is provided by which he could recover the expense from



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Swigert, or charge that expense as part of his fees. It seems to us this was the duty of Swigert or his attorney, and that the constable is not chargeable with any neglect in the matter. We are of opinion this effort to make the constable pay the plaintiff the amount named in the special execution, ordering him to make that money from the sale of goods he never seized or had a right to seize, is without merit, and that substantial justice has been done. The judgment is affirmed.

Union Life Insurance Co. v. Hannah M. Winn.

1. **INSURANCE**—*What Makes a Prima Facie Case for the Plaintiff on a Policy.*—In an action on a policy of life insurance, proof of the execution and delivery of the policy, death of the insured, and the payment of the premiums, make a *prima facie* case for the plaintiff.

2. **ESTOPPEL**—*By Recitals in Policy of Insurance.*—On grounds of public policy insurance companies are estopped to prove, for the purpose of avoiding the contract of insurance, that the premium, which the policy acknowledges is paid, has not in fact been paid.

**Assumpsit**, on a policy of insurance. Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

ADAIR PLEASANTS, attorney for appellant; HENRY CURTIS, of counsel.

WILLIAM McENIRY, attorney for appellee; SWEENEY & WALKER, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was an action brought by Hannah M. Winn upon a policy of insurance for her benefit upon the life of her husband, William M. Winn, issued by the Union Life Insurance Company, November 28, 1894. Winn died May 3, 1896, from injuries received in a fire in his store. To the declaration upon the policy defendant filed five pleas—the first

the general issue, and the others special pleas. The special pleas went out of the case upon demurrers to replications carried back to said pleas. Another special plea was filed and stricken from the files. These rulings are not questioned by the assignments of error nor discussed by counsel for appellant. The case was tried upon the general issue. Plaintiff obtained a verdict and a judgment thereon for \$2,236.90, and defendant appeals.

The policy insured the life of Winn for six months, with a provision agreeing to renew and extend the insurance for each successive six months during his life upon payment by him, on or before May 28th and November 28th in each year, of a semi-annual premium, less dividends. Plaintiff introduced the policy, proved the death, and introduced receipts from the company for each semi-annual premium from the date of the policy to and covering the date of Winn's death. The body of the last receipt, dated November 28, 1895, signed by the secretary of the company, was as follows :

"Received from Wm. M. Winn seventeen and 30-100 dollars, being the semi-annual premium on policy 5047, due November 28, 1895, insuring two thousand dollars on the life of Wm. M. Winn to May 28, 1896."

This proof made a *prima facie* case for plaintiff.

Defendant introduced proof by depositions tending to show said last premium was paid by a note for \$16.96, signed by deceased, dated November 28, 1895, payable April 1, 1895 (which the agent who drew it intended should be April 1, 1896), and put the note in evidence, and proved it was unpaid. The note recited it was given for said semi-annual premium due November 28, 1895, and that it was not given or received as payment of said premium, but as an extension of time for the payment of the premium; that time of payment was of the essence of the contract; that if the note was not paid when due the policy should become suspended during default in such payment, and the principal and interest of the note should be deemed fully earned premium and collectible at once, notwithstanding such suspension, and that no suit to collect the note should avoid the

suspension before actual payment of the whole sum due thereon.

Plaintiff then proved by the depositions of a number of witnesses that they were familiar with the handwriting and signature of Wm. M. Winn, and that the signature to the note was not that of Wm. M. Winn. These depositions were taken long before the trial, and defendant did not seek to prove at the trial that the signature was that of Winn, but relied upon further depositions to the effect that the officers of the company received a letter purporting to be from Winn saying he was unable to pay the premium and asking for an extension to April 1st; that in response this note was prepared and sent by mail to his address, and received back, bearing what purported to be his signature; and the receipt for said last premium was then mailed to him.

Defendant therefore did not deny that it had issued and delivered to Winn a receipt continuing his policy in force beyond the date of his death, but it claimed that the consideration for said receipt continuing the policy in force was another contract made with it by Winn; and that by the provisions of that later contract the policy became suspended on April 1, 1896, before his death, by reason of his failure to pay the sum specified in said contract, and remained suspended till his death. When it was met by proof that Winn never executed that contract it then sought to show the receipt was issued and the policy thereby continued in force upon the belief of its officers that he had executed the contract, and therefore was issued by mistake.

The policy made no provision for its suspension during any six months after it had issued a receipt continuing it in force, no matter whether such receipt was issued for cash or for a promissory note. By the policy, which is to be construed most strongly against the company, it agreed to pay upon Winn's death \$2,000, "after deducting therefrom the balance of the year's premium, if any, and all other indebtedness to the company." It does not appear there could have been any indebtedness to the company except past-due premium, after renewal receipts issued upon a promise to pay it later. Appellant says in his brief:

"This note and contract, being a printed form, shows that the extension of time granted to Winn was not an unusual act, an isolated case, contrary to the usage of the company, but a common transaction between the company and its members."

We accept this statement by appellant as correct, and are justified in concluding that the provision we have quoted from the policy was meant to apply to such a case. Defendant and Winn had therefore contracted in the policy that this indebtedness for premium should be deducted from the sum insured, where the policy had been extended without actual payment in cash. The parties had in the original contract provided for this contingency. If Winn had made a later contract with the company, that non-payment should suspend the policy after the company had, in writing, continued it in force for six months, we are of opinion it could not avail itself of the later contract as a defense under the general issue, but should have interposed that defense by some special plea, not subject to demurrer, and this it did not do. It had no pleading which would admit that defense.

But it is said the company ought not to be bound by the receipt, because it was issued upon the mistaken belief that the signature to the note was genuine. This position assumes the jury were bound to believe the receipt was issued as claimed by the company's agents and officers. But there were reasons why the jury might have concluded that the correct explanation of the receipt had not been given. The officer of the company claimed to have had correspondence with Winn about this receipt less than six months before his death. It could not produce any such correspondence. It may well be supposed that the fire which destroyed Winn's store and cost him his life may have destroyed whatever proof he had as to the manner in which he obtained the receipt; but no good reason appears why the company should not have kept and been able to produce the correspondence upon which it relies. The fact that this officer reasoned that he must have destroyed this correspondence, though he did not claim to remember hav-

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ing done so, did not make it the conclusive duty of the jury to believe him. Again, the jury were not only warranted, but were, in fact, required by the evidence, to find that the signature to the note was not that of Winn. No reason appears why any of his friends should have forged his name to this small note and forwarded it, nor why Winn should have sent the company a forged note. The jury may have concluded that this story was unreasonable, and that the true consideration for which the receipt was issued had not been shown. We are of opinion that the defense of the company necessarily failed when it appeared Winn did not sign the note. The company had in writing continued the policy in force. The supposed contract for a suspension of the insurance turned out not to have been executed by deceased. If the last premium had not, in fact, been paid, the policy afforded the company full protection by providing for the deduction of unpaid premium from the face of the policy.

But further, the jury seem to have allowed the premium to the company, as the policy provided. The note was dated November 28, 1895, was for \$16.96, and bore interest at eight per cent. There was due thereon at the date of Winn's death, May 3, 1896, \$17.54. Deducting that from the face of the policy (\$2,000) leaves \$1,982.46. That sum, at five per cent interest, from that date to the day of the verdict, amounted to \$2,280.10. The verdict was only for \$2,236.90, being less than was due after deducting the unpaid premium. Substantial justice has therefore been done defendant.

There is another principle upon which we think this defense ought to fail. The policy, as already indicated on its face, only insured the beneficiary from its date, November 28, 1894, to noon of May 28, 1895, that is, for a period of six months, and then agreed to extend and renew the insurance each successive six months of Winn's life upon the payment of a semi-annual premium. The last receipt above set out not only acknowledged the receipt of the last semi-annual premium, but it also stated that the effect of

that payment was to insure \$2,000 on the life of Wm. M. Winn to May 28, 1896. It thus operated as a contract extending the insurance, and ought to be subject to the rules governing policies. On grounds of public policy insurance companies are estopped to prove, for the purpose of avoiding the contract of insurance, that the premium, which the policy acknowledges is paid, has not, in fact, been paid. (*Teutonia Life Insurance Company v. Anderson*, 77 Ill. 384.) We think that, under the peculiar language of the policy and of the receipt, defendant should be estopped to prove, for the purpose of defeating the extension recited in the receipt, that the payment therein acknowledged was not, in fact, made.

Appellant's brief states that the court erred in refusing certain instructions offered by defendant, and does not discuss the supposed error. We find the substance of said refused instructions contained in other instructions given at the request of defendant. The judgment is affirmed.

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**Isora W. Faxon v. Grand Lodge Brotherhood of Locomotive Firemen and M. E. Rhea.**

1. **BENEFICIARY ASSOCIATIONS—Who May Become Beneficiaries.**—When the organic law of a society prescribes what class of persons may become beneficiaries of its insurance, it is not in the power of the society, or one of its members, or both, to enlarge or restrict these classes.

2. **SAME—Effect of Naming Persons Who are Ineligible.**—Neither the act of a member of a beneficiary association, in naming a person who is not within the classes to be benefited, nor the act of the corporation in making the certificate which it issues payable to such person, can deprive the beneficiaries designated by the law, of their right to, or interest in, the fund.

3. **SAME—Who Can Not be a Beneficiary.**—The fact that the insured member boarded with a person, and paid for his board, in no way makes her a dependent within the meaning of the law, nor does she come within any of the classes enumerated in the law, or in the constitution of the society, and the mere fact that she is named in the certificate as a beneficiary gives her no right to the fund.

4. **SAME—Eligibility of a Step-mother.**—In cases of this kind, the

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step-mother is related by affinity in the same degree as a natural mother is by consanguinity, and may be named as a beneficiary.

**Interpleader.**—Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded, with directions. Opinion filed February 1, 1900.

**Statement of Facts.**—This was a bill in equity, filed by Isora W. Faxon against appellees; the Brotherhood of Locomotive Firemen and Margaret E. Rhea. The brotherhood is an unincorporated fraternal benefit association, doing business under the laws of this State. Prior to December, 1894, its principal office was located at Terre Haute, Indiana. In that month it moved to Peoria, since which time the grand lodge has been located there.

On October 27, 1892, the brotherhood issued to Len E. Faxon a beneficiary certificate for \$1,500 in which Len G. Faxon, the father of the assured, was named as the beneficiary. On January 2, 1895, after the brotherhood had commenced doing business under the laws of Illinois, it called in all its certificates previously issued, changed their form, and issued new ones according to the new form.

The mother of the assured died in the spring of 1893, and in the same year the father married his deceased wife's sister, a marriage which it seems was not pleasing to the assured.

Len G. Faxon died on November 27, 1895, and no new beneficiary was named until April 6, 1897, when appellee M. E. Rhea was named in the certificate as such beneficiary. She was no relation to the assured, but was designated in the certificate as his "friend." The evidence shows that Mrs. Rhea kept a boarding house; that the assured boarded with her and was on terms of great friendship and intimacy with the family, and sometimes called Mrs. Rhea "mother." It appears he was probably engaged to be married to a daughter of Mrs. Rhea in 1893, but the engagement was broken off for some reason, and the daughter was married to another person in 1897.

The home of Mrs. Rhea was then in Paducah, Kentucky,

as was also that of assured's father, mother and step-mother. In 1893 or 1894, assured went to New Mexico. He returned at the time of his father's funeral in November, 1895, remaining about two weeks, and then going to El Paso, Texas, and never returned after that time to Paducah. He was quite dissipated during the last few years of his life and died at Needles, California, February 19, 1898.

The preamble to the laws of the brotherhood, and also section 48 of the by-laws, declared that the beneficiary department was organized for the purpose of furnishing substantial relief to the members and their families, and all the forms adopted by the society seem to recognize the fact that no one but a relative or member of the family could become a beneficiary.

On the death of the assured the officers of the brotherhood recognized the right of appellant to the fund in question, but refused to pay it to her without the consent of Mrs. Rhea, who was named in the certificate as beneficiary.

Appellant then filed her bill in this cause, claiming the fund as the only surviving member of the family of the assured, and insisting that under the laws of the order she, and not Mrs. Rhea, was entitled thereto. The brotherhood answered, admitting its liability, and paid into court \$1,202.40, to be disposed of by the court after it was determined who was the legal beneficiary.

Appellee Rhea answered the bill, admitting that the fund was created for the benefit of the family of the insured, but denying that Len E. Faxon was ever a member of the family of the complainant; denies that complainant was the step-mother of the assured, and claimed the fund as the beneficiary named in the certificate.

Appellee Rhea also filed a cross-bill setting up the same claims and praying a decree that the fund be paid to her.

Appellant and the brotherhood filed answers to the cross-bill, and the cause, being at issue upon the bill and cross-bill, was referred to the master to take and report proofs, together with his conclusions of fact and law thereon.

The master found and so reported, that appellee Rhea,



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the cross-complainant and beneficiary named in the last certificate issued by the brotherhood to Len E. Faxon, was not eligible as a beneficiary under the statutes of Illinois and the constitution of said brotherhood; that she was not a member of the family of the deceased certificate holder as required by the constitution of said brotherhood. The master further found that the equities of the case were with appellant; that she was the legal beneficiary and entitled to the fund in question.

Exceptions were filed in the Circuit Court to the master's report; on a hearing they were sustained, and a decree was entered directing the clerk to pay over to Mrs. Rhea the fund deposited in court, she to pay therefrom the costs of this proceeding.

From this decree the complainant prosecutes her appeal to this court.

COVEY & COVEY, attorneys for appellant.

JAMES M. RICE, attorney for appellees.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

We think it entirely clear that after the brotherhood society came into this State it could only do business, as a fraternal beneficiary society, under and in accordance with the laws of this State.

By section 1 of an act of the general assembly approved and in force June 22, 1893, it is provided, in case of such fraternal beneficiary societies, that "Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member." (Hurd's Statutes 1897, p. 968, par. 258.)

The preamble to the constitution of the brotherhood society contains, among other things, the following:

"Realizing the fact that our vocation involves ceaseless peril, and that it is a duty we owe ourselves and our fami-

lies to make a suitable provision against those disasters which almost daily overtake us on the rail, the necessity of protecting our interests as firemen, of extending to each other the hand of charity, and being sober, industrious and honorable men becomes self-evident; and hence the brotherhood has adopted as its cardinal principles the motto: Protection, charity, sobriety and industry."

By the 47th and 48th sections of the constitution a beneficiary department is created, the 48th section reading as follows:

"Established for members and their families.

Section 49. The beneficiary department of this order, established to provide substantial relief to members and their families in the event of death or total disability, shall be known as the Beneficiary Department of the Brotherhood of Locomotive Firemen."

So far as we can discover from the evidence in the record, the whole plan and scheme of the beneficiary department of the brotherhood was to provide substantial relief for the families of the members in the event of their death.

We understand the rule to be that when the organic law of a society prescribes what classes of persons may become beneficiaries of its insurance, it is not in the power of the society, or one of its members, or both, to enlarge or restrict these classes. Niblack on Benefit Soc., Sec. 158, p. 311; 1 Bacon on Ben. Soc., Sec. 244, p. 451.

In *Alexander et al. v. Parker*, 144 Ill. 355, 364, it is said:

"Neither the act of a member in naming a person who is not within the classes to be benefited, nor the act of the corporation in making the certificate which it issues payable to such person, can deprive the beneficiaries designated by law of their right to, or interest in, the fund."

Citing *Palmer v. Welch*, 132 Ill. 141; *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Britton v. Royal Arcanum*, 46 N. J. Eq. 102; *Bacon on Ben. Soc.*, Secs. 245 and 252.

Mrs. Rhea was not a member of the family of the assured; does not claim that she was. Nor was she in any way dependent upon him for support. The fact he boarded with her when in Paducah, and paid for his board, in no way made her a dependent within the meaning of the law of 1893

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above cited. Clearly, then, she does not come within any of the classes enumerated in the law, or in the constitution of the society, and under the authorities above cited the mere fact that she was named in the certificate as a beneficiary gives her no right to the fund. (*Palmer v. Welch, supra.*)

The case of *Lister v. Lister*, decided by the Kansas City Court of Appeals, October, 1897, was a controversy over a beneficiary certificate issued by this same brotherhood, and the court, in delivering the opinion, quoted the same portions of the law of the society which we have referred to, and said:

"It is apparent from the foregoing parts of the constitution that the object of the organization of the lodge was, in case of the death of a member, to provide for his family. The fund, under the terms of the by-laws, must, as we have seen, go to the family of deceased."

We concur in this opinion. But it is contended that because section 51 of the by-laws provides that upon the death of a member the person named in the certificate as the beneficiary shall be entitled to receive the amount specified therein, that therefore Mrs. Rhea is entitled to the fund. The same claim was made in the *Lister* case, *supra*, in passing upon which the court said:

"Plaintiff has cited us to other sections of the by-laws, where, in general terms, the fund is directed, on the death of a member, to be paid to the beneficiary named in the certificate. But these general terms are used on the assumption that the named beneficiary is such a one as is contemplated by the order. They must be read and interpreted in connection with the evident object of the existence of the association."

To the same effect is the holding of our own Supreme Court in passing upon a similar provision in *Palmer v. Welch, supra*. Our conclusion on this point is that Mrs. Rhea was not entitled to the fund, and the court was in error in decreeing that it be paid to her.

The more difficult question we are called upon to determine is, whether or not appellant is within either of the

classes mentioned in the statute or the constitution and laws of the brotherhood. But the authorities seem to hold that in cases of this kind, the step-mother is related by affinity, in the same degree as a natural mother is by consanguinity. *Renner et al. v. Bohemian Slavonian Ben. Soc.*, 89 Wis. 401; *Spear v. Robinson*, 29 Me. 531; *Higbee v. Leonard*, 1 Denio, 186; *Simcoke v. Grand Lodge*, 84 Iowa, 383; *Bennett v. Van Riper*, 47 N. J. Eq. 563.

Appellant was the wife of Len G. Faxon, the father of the assured, and hence was related to the latter by affinity. She was the only surviving member of the family. The assured had no brothers or sisters, and if Mrs. Rhea is not entitled to the fund (as we have seen she is not), the only other person claiming it and coming within any of the classes named, is the appellant. There is no provision in the laws of the society for benefits to heirs as such, and we are of opinion that, under the statute, only in cases where they were named as beneficiaries could heirs take the fund.

Under the statute and laws of the society, as well as the authorities cited, we are driven to the conclusion that appellant is entitled to the fund in controversy, or no one is. The brotherhood acknowledges its liability and has paid the money into court. Some one is entitled to it. We think appellant is the only one who has shown any legal right to it, and as the only surviving member of the family of which the assured was ever a member, we conclude the balance of the fund ought to be paid to her.

The decree will be reversed and the cause remanded, with directions to enter a decree in favor of appellant for the balance of the fund due on the certificate.

Reversed and remanded with directions.

**John T. McGrath and James M. Attley, partners under the name of McGrath & Attley, v. Frank Donaldson.**

1. **MECHANICS' LIENS—*Rights of Sub-contractors.***—A sub-contractor is not entitled to a lien under the lien law of 1874, unless notice has been given the owner as provided by law.

2. **SAME—*When the Owner May Pay the Contractor.***—Until the owner is notified of the sub-contract in one of the ways prescribed by the statute, he may lawfully pay money to the original contractor, whether due or not, and does not thereby violate the rights of sub-contractors of which he has not been notified.

3. **SAME—*The Law to be Strictly Construed.***—The lien law is to be strictly construed, and he who seeks a lien must show a clear compliance with all its requirements.

**Mechanic's Lien.**—Appeal from the Circuit Court of Ogle County: the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

J. W. ALLABEN, attorney for appellants; JAMES LINDEN, of counsel.

J. C. SEYSTER, attorney for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On April 10, 1899, McGrath and Attley, partners, filed this bill against Frank Donaldson and John Walker to enforce a sub-contractor's lien upon land owned by Donaldson in Ogle county, for materials furnished and used in the construction of a dwelling house thereon. The Circuit Court sustained a demurrer to the bill of complaint and dismissed it. The complainants appeal.

The bill shows that in November, 1894, Donaldson entered into a parol contract with Walker for the construction of a dwelling house upon the premises described in the bill for \$1,295, nothing being agreed as to when payments should be made; that about December 1, 1894, Walker made a parol contract with complainants to furnish materials for

the house for \$740, to be furnished within a reasonable time; and that they did furnish materials under said contract, and some extras, up to April 8, 1895, when Walker ceased calling for material, and did not thereafter call for the rest of the material complainants were to furnish. The bill states the amounts furnished by complainants, the sums paid them by Walker, the materials returned to them, and that there was left \$380.49 due them, which is still unpaid. The bill further states that Walker abandoned the building, leaving it unfinished, about April 15, 1895, and has since done nothing toward the completion of the work and the fulfillment of his contract with Donaldson; that Donaldson from time to time had paid Walker various sums on his said contract, when in fact nothing was due him till the completion of the building, and that said payments were in violation of and prejudicial to the rights and interests of complainants, and that if Donaldson had not wrongfully made these illegal payments to Walker there would have been enough money left in Donaldson's hands to pay the balance due complainants. The bill sought to establish a lien upon the premises for the balance due complainants.

The rights of the parties are to be determined by the lien law of July 1, 1874, with such amendments thereto as were in force during the period covered by the dates stated in the bill of complaint. Complainants base their bill upon section 45 thereof, which provides that if the original contractor shall fail to complete his contract, "any person entitled to a lien as aforesaid may file his petition in any court of record against the owner and contractor;" that the parties employed on the building shall have notice of the suit, and may appear and have their claims adjudicated, and "decree shall be entered against the owner and original contractor for so much as the work and materials shall be shown to be reasonably worth, according to the original contract price, first deducting so much as shall have been rightfully paid on the original contract by the owner, and damages, if any, that may be found to be occasioned the owner by reason of the non-fulfillment of the original contract; the balance to

be divided between such claimants in proportion to their respective interests, to be ascertained by the court."

The lien of a sub-contractor is given only by section 30 of said act. In order for a sub-contractor to be "entitled to a lien," within the meaning of said sections 30 and 45, he must have served written notice upon the owner as provided in sections 31 and 32, unless the original contractor has furnished the owner a sworn statement under section 36, giving the owner true notice of the amount due the sub-contractor. A sub-contractor is not entitled to a lien under said act unless notice has been given the owner in one of the two ways above stated. (*Butler v. Gain*, 128 Ill. 23; *Shaw v. Chicago Sash Mfg. Co.*, 144 Ill. 520.) The bill of complaint does not state that complainants gave Donaldson any notice of the sub-contract, nor that the original contractor furnished the owner a sworn statement containing such notice. Complainants did not therefore by their bill show that they were "persons entitled to a lien," and did not show they were persons entitled to the benefits of section 45. They also did not state in their bill whether the owner afterward completed the building, nor at what cost, nor that anything is left in the hands of the owner, after deducting what he paid Walker and his damages by reason of the non-fulfillment of the original contract. The only claim of the bill in that respect is that because Donaldson paid money to Walker before the building was completed, and before it was due under the implied contract to pay when the building was completed, he paid the money wrongfully, and in violation of the rights and interests of the sub-contractors, and that if he had not done so there would have been money in Donaldson's hands sufficient to liquidate complainants' demand. The cases above cited clearly show that until the owner is notified of the sub-contract in one of the ways prescribed by the statute, he may lawfully pay money to the original contractor, whether due or not, and does not thereby violate the rights of sub-contractors of which he has not been so notified. (*Prescott v. Maxwell*, 48 Ill. 82.)

The lien law is to be strictly construed, and he who seeks such lien must show a clear compliance with all the requirements of the statute. This complainants did not do, and therefore the demurrer was properly sustained to their bill of complaint. The decree is affirmed.

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**Thomas A. Bedwell et al. v. Andrew Ashton et al.**

1. PRACTICE—*In Suits Against Two or More Defendants.*—Where several persons are sued in an action *ex contractu*, the plaintiff must prove a cause of action against all defendants sued and declared against, whether served with process or not, otherwise he will not be entitled to judgment against any.

2. IDEM SONANS—"Claes Lundine" and "Chas. Lundine."—In the absence of proof that Claes Lundine and Chas. Lundine are one and the same person, as the two names are not *idem sonans*, the court will not assume that they are so.

3. VERDICTS—*Direction for the Defendant, When Proper—Liability.*—When the plaintiff fails to prove the joint liability of all the parties made defendants to the suit, the action of the court below, in excluding the evidence and directing a verdict for the latter, is proper.

Assumpsit, on an account. Appeal from the Circuit Court of Winnebago County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

J. E. GOEMBEL, W. H. SIZER and ROBERT REW, attorneys for appellants.

R. K. WELSH and H. P. HOLLAND, attorneys for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit in assumpsit, by appellants against appellees, for the balance due on an account for wood and coal alleged to have been furnished by the former to the latter between January 1, 1893, and March 17, 1894.

The declaration charged that appellees were, at the time the wood and coal were furnished them, partners doing business under the firm name and style of Co-operative Supply



Company. There was a plea of the general issue, and also a special plea denying joint liability by certain of the defendants. It was shown by the evidence that about September 20, 1886, some seventy or eighty persons took certain preliminary steps toward the formation of a corporation to be known as the Rockford Co-operative Supply Company, or the Co-operative Supply Company, for the purpose of engaging in the fuel and general supply business in Rockford, Illinois. It appeared probable that a certificate of the organization of such a corporation was issued by the Secretary of State, but if so the same was never placed on record in the office of the recorder of the county where its place of business was located, as required by law. The Supply Company continued in business from 1886 until 1894, when it went out of business, owing appellants the sum of \$533.29. This suit was commenced in December, 1898, some four years after the company had ceased doing business. On the trial below, after the close of appellants' evidence, appellees entered a motion requesting the court to strike out all the evidence introduced in the case by appellants and instruct the jury to find the issues for appellees. Appellees assigned as reasons why their motion should be granted, "That the evidence introduced by the plaintiffs, and all of it, is totally insufficient to prove their case; that plaintiffs have not established any joint liability, as alleged in their declaration, on the part of the said defendants; that plaintiffs have not proved that all of the defendants to said case are jointly liable; that it affirmatively appears from plaintiffs' evidence that said defendants were not all jointly liable; that it affirmatively appears from plaintiffs' evidence, on plaintiffs' own theory, that no joint liability exists, and that all parties who are jointly liable are not made defendants, and that it affirmatively appears that the said defendants are not liable in any manner or degree, as alleged in plaintiffs' declaration." The court sustained said motion and instructed the jury as requested, and thereupon the latter returned a verdict in favor of appellees.

It is claimed by appellees that the steps taken by the Supply Company in its attempt to organize, together with the acts subsequently done by it, constituted it a corporation *de facto* as to creditors dealing with it in its corporate capacity, and that in the absence of fraud such creditors could not charge the stockholders as partners with its debt. If the company was really a *de facto* corporation there is much force in the contention that the appellees could not be held liable for its debts. *Bushnell v. Consolidated Ice Machine Company*, 138 Ill. 67. But waiving the question as to whether or not there was a *de facto* corporation, and assuming that appellants became jointly and severally liable, either as partners or under the statute, for all debts and liabilities made by them and contracted in the name of said company, then before any one of them could be charged with the indebtedness in question, it must be shown that he was a stockholder at the time the indebtedness was contracted, or that he agreed to become liable with the others. *Thompson on Corporations*, Vol. 3, Sec. 2970.

The account sued on commenced January 1, 1893. It appeared from the stubs of the stock certificate book that no stock was issued to either of the defendants Ryan Tucker or J. Kessler until February 23, 1893, and there is nothing to show that Magnus Lindell was in any way connected with the company until May 8, 1893, when a certificate of stock was transferred to him by James Alberts. J. G. Redmond appears to have been an assignee of stock, but when the transfer was made was not shown. As these parties can not be held bound for that portion of the debt which was contracted prior to the time they became interested in the company, and as there was no proof to show what that portion of the indebtedness was, no joint judgment for any amount could be recovered against them with the other defendants. There was no proof that Claes Lundine, who was made a defendant, was ever a stockholder. The name of Chas. Lundine appears as a stockholder, but the two names are not *idem sonans*, and, in the absence of proof, we can not assume that they are the same person.

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There is no proof that L. Sandine, who was made a defendant, was ever a stockholder.

Where several are sued in an action *ex contractu*, plaintiff must prove a cause of action against all the defendants sued and declared against, whether served with process or not, otherwise he will not be entitled to judgment against any. *Cassaday v. Trustees of Schools*, 105 Ill. 560; *United Workmen v. Zuhlke*, 129 Ill. 298.

As appellants failed to prove the joint liability of all the parties made defendants to the suit, the action of the court below, in excluding the evidence and directing a verdict for the latter, was entirely proper. The judgment of the Circuit Court is accordingly affirmed.

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**Milton Snyder v. William C. Fearer.**

1. **REAL ESTATE BROKER—When Entitled to His Commissions.**—Where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not thereby be deprived of his right to his commission.

2. **SAME—When the Owner Negotiates the Sale.**—Where the agent introduces a sufficient purchaser to the owner, he will not be deprived of his commissions because the owner negotiates the contract himself, or voluntarily reduces the price of the property.

**Assumpsit, for commissions.** Appeal from the Circuit Court of Ogle County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

FRANCIS BACON, attorney for appellant.

W. P. FEARER and J. C. SEYSTER, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit by appellee against appellant to recover for services alleged to have been rendered by him to the latter, in relation to the sale of certain real estate known as the Snyder farms consisting of some 240 acres.

The facts in the case, as testified to by appellee, are as follows:

On September 19, 1898, appellant came to appellee, who was in the real estate and brokerage business, and asked him if he could sell his farm. Appellee said he would try, and that he could sell it if the value placed upon it was not too high. Appellant said the land was worth \$80 an acre, but that if appellant would get \$70 an acre for it he would give him \$100. Appellee thereupon made a memorandum of the number of acres and the price and undertook the sale. The next day appellee called William Shafer to his office and told him that he had the Snyder farm for sale and was going out to see Harry Kauffman in reference to the matter, and that he thought he could sell Kauffman the farm. Shafer said that he had been trying to buy the farm, and asked appellee if he would not wait until he, Shafer, saw Snyder about the matter. Appellee agreed to do so, and on the same day saw appellant and told him what he had done. Appellant thereupon said, "I knew we could fetch him." The next day Shafer went to appellant and purchased the farm for \$68 an acre. A day or two later appellee met Shafer and asked him if he had seen appellant. Shafer replied that he had, and that he had purchased the land, provided appellant's brother consented to it. Some two months later appellee called appellant's attention to the matter and requested payment, but appellant refused to pay, saying that he did not think appellee had earned anything. Upon the trial the jury returned a verdict for \$100. A motion for a new trial was overruled and judgment given for that amount. Appellant denied the making of the agreement to pay appellee \$100 for the sale of the premises in question, but appellee was fully corroborated by two witnesses, who swore that they overheard the conversation between the parties when the agreement was made, while the testimony of appellant denying the conversation stands alone.

Shafer testified that after he had talked with appellee he thought he had better go around and buy the land if he wanted it, and that he did afterward go and close the

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trade. Appellant himself testified that he knew appellee, had talked to Shafer about the matter, but did not know that he was going to charge for his services.

It therefore clearly appears from a preponderance of the evidence that appellant agreed to pay appellee \$100 if he would make a sale of the farm at \$70 an acre, and that appellee's efforts either caused the sale to Shafer or largely contributed to bringing it about. The fact that the land was sold at a less price than \$70 an acre is immaterial, as affecting the rights of appellee.

In the case of Hafner v. Herron, 165 Ill. 242, it is said in speaking of commissions claimed by a broker:

"It is sufficient if the sale is effected through the efforts of the broker or through information derived from him. It is also true that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions. \* \* \* Having introduced a sufficient purchaser to the owner, he (the broker) is not to be deprived of his commissions because the owner negotiates the contract himself, or voluntarily reduces the price of the property."

It appeared from the evidence that the land in question had been the property of the deceased father of appellant, and that appellant and a brother were the executors of the father's will. The court upon the trial instructed the jury that it made no difference as to appellee's right to recover "whether the defendant owned the title to the farm in his own name or whether it was owned by his father's estate." It is contended by appellant that this instruction was incorrect, for the reason that appellant had no authority to make the contract claimed, as the land in question was the property of an estate, and the disposition of the same had been provided for by a will authorizing appellant and his co-executor to make a sale thereof. We do not think this objection is well taken. It is true, as stated by appellant, that a contract for the sale of the premises could not have been entered into by appellant without consent of his co-executor, which would have bound them to perfect the sale,

but that does not affect the question of appellee's right to recover in this case. Appellant, as executor of his father's will, was interested in effecting a sale of the premises. He could, therefore, personally employ another person to assist in making the sale, and thereby render himself personally liable to such person in case the sale was effected through such instrumentality.

We are of opinion the verdict of the jury was sustained by the evidence, and that there was no error in the instruction referred to. The judgment of the court below is therefore affirmed.

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**Watkins Medical Co. v. John J. Paul and August F. Korf.**

1. **CONSTRUCTION OF CONTRACTS—*Vendor and Vendee.***—Where a medical company employs an agent in a certain territory and enters into a written contract with him for the sale of its drugs, etc., for a certain period, prescribing his duties, manner of selling and reporting, compensation, etc.; the medical company is the seller of the drugs, etc., and as such is required to take out a license under the act to regulate the practice of medicine in the State of Illinois.

2. **CONTRACTS—*Prohibited by Statute.***—Where the law imposes a penalty for making a contract, it impliedly forbids parties from making such contract, and when a contract is prohibited, whether expressly or by implication, it is illegal and can not be enforced.

**Assumpsit;** on a contract in writing. Appeal from the Circuit Court of Ogle County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

FRANCIS BACON, attorney for the appellant.

J. C. SEYSTER, attorney for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

The J. R. Watkins Medical Company, a Minnesota corporation, had employed John J. Wehmeyer as its agent, to

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sell its drugs in Champaign county, Illinois, for several years, and on January 18, 1896, entered into a written contract with him for the period from that date to March 1, 1897, prescribing his duties, manner of selling and reporting, compensation, etc. John J. Paul and August F. Korf signed a contract with the Medical Company guaranteeing performance, by the agent, of his contract and payment thereunder. After selling in Champaign county for some time under said contract Wehmeyer absconded, owing the Medical Company \$460.76 for sales made, and either not collected or not remitted, and for merchandise either sold and not reported, or unsold and not returned, as required by his contract. The Medical Company brought this suit against the guarantors to recover that sum. A declaration and a plea of the general issue were filed, and the parties stipulated plaintiff could introduce any evidence competent under a proper declaration on the contract, and defendants could introduce any evidence competent under any plea, and take advantage of any defense, as if specially pleaded. A jury found for defendants and judgment was rendered in their favor, and plaintiff appeals.

Section 11 of the act entitled "An act to regulate the practice of medicine in the State of Illinois," in force July 1, 1887, requires "any itinerant vender of any drug, nostrum, ointment or appliance of any kind, intended for the treatment of disease or injury, or who shall, by writing or printing, or any other method, profess to cure or treat disease or deformity by any drug, nostrum, manipulation or other expedient," to "pay a license of \$100 per month" to the State Board of Health, and gives that body power to refuse such license for sufficient cause, and subjects "any such itinerant vender who shall vend or sell any such drug, nostrum, ointment or appliance, without having a license so to do," to a fine of not less than \$100, nor more than \$200 for each offense. The contract between the Medical Company and Wehmeyer appointed the latter the agent of the Medical Company "for the sale and distribution of Dr. Ward's liniment, Egyptian stick salve, condition powders,

vegetable cathartic and little liver pills, petro-carbo salve, cough syrup, gen-de-can-dra and barb wire embrocation; also extracts and essences, and other goods manufactured by said The J. R. Watkins Medical Company, in the following named territory, and no other, to wit, in the State of Illinois, Champaign county." The proof showed that the remedies specifically named in the above quotation from the contract are medicines, drugs and ointments for the treatment of disease and injuries. The Medical Company did not take out a license, as required by our statute above referred to. The verdict and judgment for defendants depend upon the correctness of their contention that for lack of a license the contract with Wehmeyer was void, and can not be enforced, and therefore the guaranty can not be enforced. The Medical Company contends, first, that the remedies were not sold in a manner making the seller an itinerant vender, and therefore a license was not required; second, that Wehmeyer was the itinerant vender, if there was any, and the proof does not disclose he did not have a license; and third, that if the Medical Company was required to have a license, its failure to procure it only exposes it to the prescribed fine, and does not invalidate the contract.

We think it clear the contract provided for selling and distributing these remedies by itinerant vending. The agent was therein made to agree to provide himself with a suitable horse and vehicle and thoroughly canvass Champaign county for the introduction, distribution and sale of said remedies. Where sales could not be made, the agent was to leave on trial, samples thereof, with persons whose custom he might solicit, on terms named on the bottles, etc. He was to collect, as far as possible, from purchasers the prices of the remedies sold, and from persons with whom remedies were left on trial such sums as were prescribed on bottles, etc. He was to report to the Medical Company each week, giving a full, detailed account of the past week's work, etc., with reasonable excuse for all unemployed time during the week. The agent agreed to devote his time exclusively to that business and have no other occupation; he



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was to sell the remedies at retail prices, to actual consumers only, in Champaign county, and was forbidden to deposit with or sell to any person at wholesale to enable such person to sell at retail. The Medical Company furnished Wehmeyer with a rubber stamp and pad with which to stamp his name on advertising matter. The stamp designated him as "Traveling salesman for Dr. Ward's remedies." The Medical Company furnished Wehmeyer order blanks, on which were directions to him, as follows:

"Always give next address. Always call, if possible, at office given as next address. If you can't get there write to the postmaster to forward your mail."

While the greater part of the orders Wehmeyer filled out directed the bills to be sent either to Dewey or Champaign postoffices, yet other orders named numerous other postoffices at which the agent should be addressed. Many reports by the agent (not abstracted) were in evidence, in which he gave excuses for not working specified days in the preceding week. They often named rain and bad roads as the excuse. In one he said he had been traveling the greater part of the week, notwithstanding the bad roads. In another he said he could not travel the preceding week because the roads were almost impassable. In another he reminded the Medical Company to always send his mail to the address named in his last letter. In another he said he would be around Dewey that week and at Ludlow the next. From the contract, and all the documents put in evidence by plaintiff, we think it clear that the agent's duty under his employment was to go through the county from house to house peddling the remedies, when he could sell them, and leaving samples on trial when he could not make a sale, and calling again at such houses and trying to effect sales after the samples had been tested. This was the practice against which the statute was directed.

Wehmeyer was but a traveling salesman for the Medical Company. He did not buy the remedies from them. The contract provided that the goods, and half the proceeds of all sales and collections, should belong to the Medical Com-

pany until the contract was fully settled and satisfied, and that if Wehmeyer disposed of the goods and proceeds contrary to the contract it should be considered an embezzlement, and he should be liable to criminal prosecution. Wehmeyer's compensation was one-half the proceeds of sales. The contract bound Wehmeyer not to enter into competition with the Medical Company in the same territory for two years after the contract expired. We are of opinion the Medical Company was the seller; that Wehmeyer was but its agent and employe, and that under the statute it was required to take out a license. It is idle to suppose there was any purpose that this employe, whose sales were comparatively trifling, should pay \$100 per month for a license to make sales for the Medical Company. As the Medical Company did not take out a license, its sales, through its traveling salesman, were in violation of law.

We come now to the question whether this contract is thereby invalidated. We think the rules of law governing this subject are correctly stated in 2 Benjamin on Sales. In section 818 that author says:

"When contracts are prohibited by statute, the prohibition is sometimes express and at others implied. Wherever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract, and when a contract is prohibited, whether expressly or by implication, it is illegal and can not be enforced. Of this there is no doubt. But the question frequently arises whether, on the true construction of a statute, the contract under consideration has really been prohibited, and in determining this point much weight has been attributed to a distinction held to exist between two classes of statutes, those passed merely for revenue purposes, and those which have in contemplation, wholly or in part, the protection of the public, or the promotion of some object of public policy."

After reviewing the cases he summarizes therefrom the following propositions in section 825:

"First. That where a contract is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. It is enough that Parliament has prohibited it, and it is therefore void.

Secondly. That when the question is whether a contract has been prohibited by statute, it is material, in construing the statute, to ascertain whether the legislature had in view solely the security and collection of the revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter that it was.

Thirdly. That in seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed, once for all, on the offense of failing to comply with the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case, the statute is intended to prevent the dealing, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced."

In the present statute there is a recurring penalty for each sale without a license, showing the object of the statute is to prevent the itinerant vending of drugs except under the license and control of the State Board of Health. We think it obvious that the purpose of the statute was not the collection of revenue, but to prevent the public from being injured in health and defrauded by itinerant sales of harmful drugs and nostrums. Therefore, under the above rules, this contract, by which the Medical Company sought to evade our statute, is impliedly prohibited, and is therefore void, and Wehmeyer is not liable to the Medical Company thereon, and as he is not liable his guarantors are not liable.

Wehmeyer sold some essences and extracts under this contract, and they were not drugs nor nostrums. If the invalidity of the contract did not affect the agent's liability for essences and extracts, then payments made should be applied upon that for which there was a legal liability, and the payments were much more than enough to extinguish that liability.

We conclude that upon the facts the verdict was right. The instructions given were inconsistent. Those given for plaintiff should have been refused. The other rulings upon instructions were substantially correct, except that one in-

struction, given for defendants, improperly left the jury to determine whether the contract was illegal. Other instructions, however, properly stated the law upon that subject, and, as we conclude the verdict is right, the judgment is affirmed.

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### D. S. Jenks v. C. C. Rounds.

1. **NON-RESIDENCE**—*Under the Attachment Act.*—Absence from the State, with a fixed abode in another place, with the intention of remaining permanently away, at least for a time, for business or other purposes, will constitute a non-residence within the meaning of the attachment act, even if there is an intention of returning at the expiration of the sojourn in the foreign State; but a casual or transitory absence from the State will not constitute such a non-residence.

2. **SAME**—*Absence Must be Protracted.*—The absence must be so protracted as to amount to a prevention of legal remedies by ordinary process; and in determining whether one has ceased to be a resident, it is important to know whether the purpose of his absence is such as to admit of the acquisition of residence elsewhere.

3. **SAME**—*Transient Visits.*—Something more than the transient visit of a person for a time at a place is necessary to make him a resident; there must be a settled, fixed abode; an intention to remain permanently, at least for a time, for business or other purposes, is required to constitute a residence within the legal meaning of the term.

4. **DOMICILE**—*Not Necessarily a Residence.*—The domicile of a citizen may be in one State or Territory and his actual residence in another.

**Attachment.**—Appeal from the Circuit Court of Kendall County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.

C. A. DARNELL and JOHN FITZGERALD, attorneys for appellant.

J. STUART WILSON and BENJ. F. HARRINGTON, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On May 4, 1898, D. S. Jenks began this suit upon a

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promissory note, by suing out an attachment against C. C. Rounds, its maker, on the ground that Rounds was not then a resident of Illinois. A writ of attachment was issued and levied upon real estate. Defendant pleaded, traversing the allegation of non-residence. A jury found the issue for defendant. Judgment for costs was entered against plaintiff, and he appeals.

From 1865 to 1897 Rounds lived at Plano, in Kendall county. In 1897 he lived in two rooms, up stairs, in a house which he owned; was a widower, and about seventy-five years old. He had grandchildren and a widowed daughter-in-law living in Nebraska. On May 19, 1897, he left the house in charge of his tenant, reserving his two rooms, and leaving his cooking utensils and part of his furniture therein, and went to Nebraska. Nine days later, on May 28, 1897, he executed a deed of his Plano home to Mattie W. Lloyd, though the deed was not recorded in Kendall county till May 19, 1898. On November 24, 1897, he married Mattie W. Lloyd, and thereafter lived with her at her mother's home in Nebraska till March 1, 1898, when he and his wife moved upon his wife's eighty-acre farm in Nebraska, where they have ever since lived, and still live. He then took charge and control of that farm, intending, he testified, to return to Illinois in the fall of 1898, after the close of that farming season. His wife, during that summer, broke her arm and became paralyzed, and her mother became sick and came to live with them, and they remained upon the farm. Rounds never returned to this State, except to attend the trial of this cause, in April, 1899, and then testified he was still in charge of his wife's farm in Nebraska, and expected to remain there during the year 1899. He went to Nebraska for his health, intending to return at some time. In the fall of 1897 he refused to vote in Nebraska, on the ground that he wished to keep his permanent residence at Plano.

Was Rounds, on May 4, 1898, a non-resident of Illinois, within the meaning of the attachment act? What constitutes non-residence under that act is thus stated in Wells v. Parrott, 43 Ill. App. 656:

"Absence from the State and having a fixed abode in another place, with the intention to remain permanently, at least for a time, for business or other purposes, will constitute non-residence, even if there be an intention to return at the expiration of the time of residence in the foreign State. Casual or transitory absence from the State will not constitute non-residence within the meaning of the attachment act. The absence must be so protracted as to amount to a prevention of legal remedy by ordinary process; and in determining whether one has ceased to be a resident it is important to know whether the purpose of the absence was such as to admit or require the acquisition of residence elsewhere."

To the same effect is *Barron v. Burke*, 82 Ill. App. 116. Both follow *Board of Supervisors v. Davenport*, 40 Ill. 197, where, in determining the meaning of the term "persons residing in the State" in the revenue law, the court adopted the language of a New York decision, as follows:

"The transient visit of a person, for a time, at a place, does not make him a resident while there. Something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term. \* \* \* The domicile of a citizen may be in one State or Territory and his actual residence in another." *Wells v. People*, 44 Ill. 40; *Drake on Attachment* (3d Edition), Section 39, *et seq.*

When Rounds originally went to Nebraska, it may be he did not at once become a non-resident of Illinois. He went for his health, and we may assume, also, to visit his grandchildren at the home of his deceased son, and he intended to return, and reserved the rooms previously occupied by him in his home at Plano. His first step to divest himself of his status as a resident of Plano was deeding his home there to Mattie W. Lloyd. Then followed his marriage to her about six months later. Then he and his wife took up their abode with her mother. On March 1, 1898, he moved upon and took charge and control of his wife's farm in Nebraska, at the beginning of the farming season, intending to remain there in charge of that farm at least till the

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close of that farming season in the fall of 1898. When he moved to that farm March 1, 1898, with that purpose, he certainly acquired a fixed abode, intending to remain there, for that season at least, for business purposes, and thereby became a non-resident of this State under the attachment act, notwithstanding his intention to return to this State at some future time. When this attachment was sued out on May 4, 1898, Rounds had been absent from the State fifteen days less than a year, had acquired a fixed abode for the time being in Nebraska, and had entered upon a business there, the performance of which would require him to remain there till at least the close of the farming season in the fall of 1898, and he then intended to remain there at least till after that time. In our judgment the absence from this State which had already occurred, and the further continuing absence already arranged for and intended, was so protracted as to amount to a prevention of legal remedy by ordinary process in the courts of this State, and made Rounds a non-resident of this State under our attachment act.

Any other rule would enable a citizen of this State, owing debts, and owning plenty of property located here to pay them, to practically prevent the collection of his debts by any process the courts of this State could give him. By removing to another State or country, intending to remain either for a fixed period or indefinitely, but with a purpose to return at some definite or indefinite future time, he would place himself beyond the reach of a summons from the courts of this State, and yet, according to the contention of appellee, attachment could not issue, and his creditors would be without legal remedy. It will not do to say his creditors could follow him to the State or country of his new abode and sue him there and get judgment, for not only would this be a hardship against which our attachment act was intended to relieve, but it might be that his property out of which the judgment could be made would remain here (and the proofs show such is the present case), and when judgment was obtained in the foreign jurisdic-

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tion, suit could not be brought upon that judgment here because of the inability to get service of ordinary process here. So that a debtor could thus avoid for a long and indefinite period the collection of his debts out of his property situated in this State, unless the attachment act applies. We are of opinion that the undisputed proofs entitled plaintiff to a verdict under the attachment issue.

This is entirely different from the question to which many of appellee's authorities are directed, whether Rounds is still a citizen of this State, has a domicile in Plano, and can vote there when he returns. It was held in *Hayes v. Hayes*, 74 Ill. 312, that "actual residence is not indispensable to retain a domicile after it is once required." The distinction between residence and domicile is also indicated in *Cooper v. Beers*, 143 Ill. 25. But under the attachment act, as interpreted in the cases above referred to, a person can not be a resident of Illinois after he has acquired a settled and fixed abode in another State or country, with the intention of remaining permanently for a time, for business or other purposes.

The instruction offered for the plaintiff was properly refused. It was too broad. It also stated the law upon subjects which the jury were not required to determine.

The judgment is reversed and the cause remanded for a new trial.

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**William E. Knapp, Adm'r, etc., v. Mamie McCormick.**

1. *PRACTICE—Delaying a Trial Discretionary.*—Whether the trial of a case should be delayed or not is a matter of discretion with the trial court, and is not assignable error.

*Claim in Probate.*—Appeal from the Circuit Court of Bureau County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

The briefs and abstracts filed herein are entitled as in the



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case of "Estate of Mary Pogrseba, alias Mary Seabeck, deceased, v. Mamie McCormick." As William E. Knapp appears to be the administrator of said estate, defended as such and perfected the appeal to this court, he is the appellant, and we have given the case what we conceive to be its proper title.

The controversy herein arises upon a claim filed by appellee against the estate of said Mary Pogrseba, deceased. On a hearing in the County Court the claim of appellee was allowed to the amount of \$200, as of the seventh class, and judgment rendered accordingly. Appellant prosecuted an appeal to the Circuit Court. At the September term, 1898, of said court, when the case was reached for trial, appellant, not appearing, was called and defaulted, and the appeal dismissed for want of prosecution. Subsequently, at the same term, on affidavits filed in support of a motion to set aside the default and reinstate the cause, the order of dismissal was vacated and the cause continued to the April term following, when the cause was tried by a jury, resulting in a verdict and judgment against the estate and in favor of appellee for \$300, as of the seventh class, to be paid in due course of administration. To reverse this judgment the administrator prosecutes an appeal to this court.

As grounds for reversal it is urged that the court rejected proper testimony offered by the defendant, and admitted improper testimony on behalf of the appellee claimant.

A careful examination of the record fails to show that the court rejected any testimony offered by the defendants. What the court did do was to refuse a delay of the trial to enable the defendant to procure witnesses by whom it was claimed certain facts could be proven.

An exception was saved to this ruling of the court, and this was the only objection taken on this point.

Whether the trial should be delayed or not was a matter of discretion with the trial court, and not assignable error, especially where no showing under oath was made for the delay requested.

The testimony supposed to have been rejected by the

court was not offered, for the reason the witnesses were not present, and hence the court could not pass on its admissibility. As to the alleged rejection of testimony, therefore, the complaint is not sustained by the record.

We think there was no error in allowing the witnesses, Mary Seabeck and Vincent J. Reinke, to testify on behalf of appellee. So far as they had any interest pecuniarily, it was adverse to the allowance of appellee's claim, and therefore they were not within the prohibition of the statute.

But, aside from this question, there was sufficient evidence, entirely uncontradicted, to fully sustain the verdict and judgment.

We find no error in the instructions, and the judgment will be affirmed.

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**Olive Gilbert and Alelia Earl v. Ella Wielert, Araminta West, J. W. Gaffield et al.**

1. *PARTITION—Solicitor's Fees, When Not Proper.*—Notwithstanding a bill for partition states the rights and interests of the parties correctly, if a defense is made of a substantial character, and undertaken with reasonable grounds, the complainant will not be entitled to have his solicitor's fees apportioned under the statute.

*Partition.*—Appeal from the Circuit Court of Iroquois County; the Hon. RICHARD W. HILSCHER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

C. W. RAYMOND, attorney for appellants.

No appearance for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a bill for the partition of some ninety-three acres of land in Iroquois county, filed by the appellants, Olive Gilbert and Alelia Earl. The bill averred that the premises in question were at the time of his death owned by Amos Gaffield, who died intestate October 16, 1898,

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leaving no widow, children or descendants of children, father or mother, surviving him; that his only heirs at law were the descendants of a brother and two sisters, who died before the intestate; that appellants and William H., J. W., Frank and Alonzo Gaffield were each entitled to 5-90 of the premises; that Ella Wielert, Araminta, John E., Edwin and Oscar F. West were each entitled to 6-90 of the premises, and that Eliza (Wilson) Reynolds was entitled to 30-90 of the same. J. W. Gaffield, Ella Wielert and Araminta West answered the bill, denying that Eliza (Wilson) Reynolds was an heir at law of Amos Gaffield and entitled to an interest in the premises, but admitting all the other allegations of the bill. William H. Gaffield and Eliza Reynolds, who was known also as Lide Reynolds and Lide Wilson, made default. The other defendants were minors and answered by their guardian *ad litem*, praying that strict proof be made of the matters alleged in the bill. There was a spirited contest over the right of Eliza Reynolds to an interest in the premises, and quite an amount of evidence taken upon the subject. The suit resulted, however, in her favor, and a decree was entered for the partition of the premises among the parties entitled thereto, according to their interests as set forth in the bill. Commissioners were appointed to make partition, who reported that the land could not be divided, and a sale was thereupon ordered and the land sold for about \$5,000. Afterward complainants entered a motion asking the court to fix their solicitors' fees and apportion the same among the parties to the suit. The court denied the motion and this appeal seeks a reversal of the decree of the Circuit Court upon that question.

Section 40 of the partition act, as amended in 1889, provides:

"In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the petition or bill, the court shall apportion the costs, including the reasonable solicitor's fee, among the parties in interest in the suit, so that each party shall pay his or her equitable portion thereof, unless the defendants or some one of them shall interpose a good and substantial defense to said bill or petition."

In passing upon this section the Supreme Court, in the case of Metheny v. Bohn, 164 Ill. 495, held, that notwithstanding the bill stated the rights and interests of the parties correctly, yet if a defense was made of a good and substantial character and undertaken with reasonable grounds, complainant would not be entitled to have his solicitor's fee apportioned, although the defense was overcome by evidence on the part of the complainant and proved unsuccessful. The defense in this case was of a good and substantial character and the right of the defendant, Eliza Reynolds, to an interest in the premises, was warmly contested. Notwithstanding the fact that the allegations of the bill were found to be true, yet under the authority of the case above quoted, we must hold that the order of the court below, denying the motion to tax and apportion solicitor's fees, was properly overruled, and the same will therefore be affirmed.

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### The Chicago & E. I. R. R. Co. v. Edward Chipman.

1. EVIDENCE—*Of Previous Conditions.*—In an action against a railroad company for killing horses, evidence showing what the condition of the guards and fences, at the place where the horses got upon the right of way, was a year before, followed by proof of their continuous bad condition from then to the time of the occurrence, is competent.

**Action for Killing Stock.**—Appeal from the Circuit Court of Kankakee County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

WILLIAM R. HUNTER, attorney for appellant.

E. P. HARNEY and T. F. DONOVAN, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Appellee brought this suit against appellant to recover the value of five horses, killed by appellant on its right of

way, in August, 1898, and on a jury trial recovered \$350. The horses were of a special breed and weight, and it is not argued that the verdict is excessive, if plaintiff is entitled to recover. The amended declaration in different counts charged a failure to construct, maintain and keep in repair suitable and sufficient cattle-guards and fences at a certain highway crossing over defendant's railroad, without the limits of towns, cities and villages, and that by reason thereof said horses strayed and wandered along and upon said railroad at said highway crossing, and were struck and killed by a locomotive engine running upon said railroad.

Plaintiff's home was west of the railroad, and he had a pasture east of the railroad, where he kept eleven horses in the summer. On the night in question they in some way escaped from the pasture through a gate, and started for home. When crossing defendant's railroad at the highway crossing between the pasture and the home place, five of them turned north, passed between the fences and the cattle-guard and to and upon the right of way, and were struck by a running train and killed, some sixty rods north of the crossing. The cattle-guards were known as wooden surface-guards. It was a disputed question of fact whether there was an opening underneath or whether that space was filled with sand. Between the ends of the guards and the fence, on either side, was a space, as to the width of which the evidence ranges from two and one-half feet to three or four feet. The fence had been in that condition since it was built a year before. The marks of the feet of one horse were found on the guards. The tracks of the other horses were between the fences and the guards on either side. Four months before, as a neighbor on horse-back was driving cattle across the track at this crossing, his cattle turned up the track and passed between the fence and the cattle-guards at this point, and he rode his horse between the fence and cattle-guards and drove the cattle back the same way. As the proof showed that the fence, at the time the plaintiff's horses were killed, was in the same condition as ever since it was built, a year before, we think this

evidence was competent. It tended to show the space was wide enough for horses to pass through, and that it had been in that condition for a long time. The jury have determined the disputed questions of fact for the plaintiff, and the evidence warranted that verdict.

The only important ruling upon testimony adverse to defendant, set out in the abstract, was cured by evidence afterward let in, covering the point. Defendant discusses the refusal of the court to permit certain other questions said to have been put by defendant, but they are not set out in the abstract, nor does the brief give the name of the witness, nor the page of the record where the alleged ruling can be found. Plaintiff's instructions complained of are in the language of the statute. The jury were very strongly instructed for defendant. We find no reversible error in the record, and the judgment is affirmed.

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### Ellwood Mfg. Co. v. Charles H. Faulkner.

1. **FRAUDULENT SALES**—*Notice to Subsequent Purchasers—Burden of Proof.*—In an action to recover from a subsequent purchaser the possession of goods originally obtained by his vendor of the plaintiff through false statements as to his financial condition, the burden of proof is upon the plaintiff to show that such subsequent purchaser was not an innocent purchaser for a valuable consideration.

2. **EVIDENCE**—*Of Fraud—Conversations with Fraudulent Purchasers.*—The burden of showing that a sale of property is fraudulent is upon the party asserting it, and, as bearing upon such question, conversations with the alleged fraudulent purchaser upon the subject, even in the absence of his vendor, prior to the time of the sale, are competent.

**Replevin.**—Appeal from the Circuit Court of Winnebago County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.

R. K. WELSH and WOOD, NEWMAN & ELMER, attorneys for appellant.

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Ellwood Mfg. Co. v. Faulkner.

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CHARLES W. FERGUSON and FROST & McEVoy, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action of replevin, by appellant against appellee, for a car load of barbed wire. The case was tried by a jury, and there was a verdict and judgment for appellee. The wire in question was sold and shipped to P. W. Fenlon, a merchant doing business at Durand, Illinois.

Fenlon, who was at the time in failing circumstances, obtained the wire of appellant by making false statements as to his financial condition. On September 7, 1897, Fenlon made a bill of sale of his stock and some other property to E. B. Norton, and on the same day Norton sold and executed a bill of sale of the same to appellee. The sales were brought about by B. A. Knight, an attorney of Rockford. This is the second time this case has been in this court. On the former occasion the I. L. Ellwood Manufacturing Company had won in the court below, and the case was reversed and remanded by this court. *Faulkner v. Ellwood Mfg. Co.*, 79 Ill. App. 544. It was there held by this court, that before the present appellant could recover, it was necessary to impeach the titles of both Faulkner and Norton, and it was said that, admitting Fenlon was guilty of a fraud, "the record discloses no direct evidence connecting appellant (Faulkner) with the fraud nor showing he had notice. Nor does it show that Norton was not a purchaser in good faith." On the trial of the present case it was admitted that Fenlon obtained the barbed wire in question upon statements as to his financial condition which were false to an extent that would have enabled appellants to recover the property in an action against Fenlon himself, had he retained possession of the same.

It was shown by a preponderance of the evidence that the property which appellee claims, was sold to him by Norton for \$1,142, and all over \$1,500 he could get out of it; that it was worth between \$5,000 and \$6,000; and appellee himself testified that the stock was inventoried at

\$3,800. Evidence was also introduced which tended to show that Norton was not in fact a *bona fide* purchaser for a valuable consideration, and that this fact was known to appellee. The bills of sale from Fenlon to Norton, and from the latter to appellee, were made out at the same time in the office of Knight, and there was evidence to the effect that Norton was ignorant of what was going on and was simply used by Knight as a go-between. From all of which we are of opinion that the verdict was not warranted by the evidence.

It was necessary for appellant to show that Norton was not an innocent purchaser for a valuable consideration, and, as bearing upon this question, conversations with him upon the subject, even in the absence of appellee, prior to the time he sold to the latter, were competent. When appellant offered evidence of such conversations it was ruled out by the court, and while a portion of the same was afterward admitted, yet the general tendency of the court was to keep out all evidence of conversations, prior to the sale, showing bad faith on the part of Norton, in the absence of appellee. Conversations after the sale were properly excluded, as Norton could not impeach his own title. Only two instructions were given for appellant, while those given for appellee were numerous.

Instruction No. 1, refused, for appellant, was the only one which defined the notice which it was necessary for appellee to have to defeat his title, and, as it stated the law correctly, should have been given.

The second instruction given for appellee told the jury that "in this case the plaintiff claims that the defendant Faulkner purchased the goods in question and at the same time knew that Peter W. Fenlon was attempting to dispose of the same to hinder and delay his creditors, and under such circumstances as would entitle the plaintiffs to recover," and that the burden of showing such facts by a preponderance of the evidence, was upon the plaintiff. The position of the appellant is incorrectly stated in this instruction, as it never claimed that Faulkner purchased the goods



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at all. The particular vice of the instruction, however, is that it places the burden upon appellant of showing by a preponderance of the evidence that Fenlon was attempting to dispose of his property to hinder and delay his creditors, "*and under such circumstances as would entitle the plaintiff to recover.*" This instruction required the jury to determine what the circumstances were which would entitle the appellant to recover, and thereby pass upon questions of law as well as fact. It was therefore manifestly improper.

By the twenty-second instruction, given for appellee, the jury was told that "the law presumes that the transaction in question in Knight's office, as far as Faulkner was concerned, was made in good faith and was an honest business transaction, and such will continue to be the presumption unless plaintiff, by the preponderance of the evidence, has proved the contrary."

The question whether the transaction in Knight's office "was made in good faith" or not was a disputed question of fact, for the jury to determine. Under the circumstances of this case, this instruction was of extremely doubtful propriety, was likely to mislead the jury, and should not have been given. *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35.

For the reasons above stated, the judgment will be reversed and the cause remanded.

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Orrin Winans v. Otto Thorp.

1. **PROCESS**—*Regularity of a Justice's Summons.*—A summons issued by a justice of the peace, and made returnable at eight o'clock A. M. on the day set for trial, is a sufficient compliance with the statute requiring such process to be returnable between the hours of eight o'clock A. M. and four o'clock P. M.

**Replevin.**—Appeal from the County Court of La Salle County; the Hon. H. W. JOHNSON, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

REEVES & BOYS, attorneys for appellant.

EDGAR ELDRIDGE, attorney for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was replevin, brought by Winans against Thorp to recover personal chattels which Thorp, a constable, had seized under an execution issued by a justice of the peace against Winans, on a judgment for \$100 and costs, which the justice had rendered against Winans. The parties waived a jury and submitted the cause under a stipulation as to the facts and pleadings, whereby the sole question to be determined was whether the justice acquired jurisdiction of the person of Winans, who had been duly served with summons, and had only appeared specially, and moved to quash the summons and dismiss the suit, which motion the justice had denied. The supposed lack of jurisdiction was because the summons was returnable on a certain day "at 8 o'clock A. M." The court below held the service of the summons gave the justice jurisdiction, and entered judgment for defendant in replevin, and plaintiff appeals.

The justice issued the summons under the act of 1895, concerning justices and constables. Section 4 of article 2 of that act, after prescribing the form of the summons, further enacts, "in which summons the justice shall specify a certain place, day, and hour, which shall be between the hours of eight o'clock A. M. and four o'clock P. M. for the trial." When the word "between" is used with reference to a period of time bounded by two other specified periods of time, such as between two days named, the days or other periods of time named as boundaries are excluded. (Richardson v. Ford, 14 Ill. 332; Coleman v. Keenan, 76 Ill. App. 315; Cook v. Gray, 6 Ind. 335; Atkins v. Insurance Co., 5 Metc. 439; Robinson v. Foster, 12 Iowa, 86; Bunce v. Reed, 16 Barb. 347; Fowler v. Rigney, 5 Abb. Pr., N. S. 182; 4 Am. & Eng. Ency. of Law (2d Ed.), 9; Anderson's Law Dictionary, title, "Between.") "Between" has a like meaning when used with reference to two boundaries in space. (Philadelphia v. C. P. Ry. Co., 151 Pa. St. 128.)

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But "eight o'clock A. M.," as a period of time, is of infinitesimal duration. The same instant eight o'clock is reached it is passed and the time between eight o'clock and nine o'clock has begun. We think it must be conceded that if this summons had been returnable one-quarter of a second after eight o'clock A. M., it would have been returnable "between eight o'clock A. M. and four o'clock P. M.," and would have been in compliance with the statute, and the justice would have had jurisdiction. Eight o'clock A. M., thus considered, is not a period of time, like a day, capable of measurement and forming a definite period as a boundary, which can be excluded, but it is a mere instant of time so minute as to be incapable of being measured and excluded from the time prescribed within which the jurisdiction of the justice can attach. We are therefore of opinion that the instant of time known as eight o'clock A. M. can not be excluded from the period prescribed by the statute, so as to deprive a justice of the peace of jurisdiction of the person of the defendant under a summons duly served and made returnable at eight o'clock A. M.

Again, it is the unwritten law of this State that "in proceedings before justices of the peace which are notified to begin at a fixed hour, neither party is in default until the expiration of that hour and the commencement of the next," and it is the duty of the justice to hold the case open till the beginning of the next hour. (First Nat. Bk. v. Beresford, 78 Ill. 391; Brown v. People, 24 Ill. App. 72.) Therefore the legal effect of this summons is that defendant was not required to appear for trial until nine o'clock A. M. The spirit of the statute was certainly complied with, for the "hour for the trial" was in legal effect nine o'clock A. M., which is between eight o'clock A. M. and four o'clock P. M., in any sense of the word "between." The judgment is therefore affirmed.

**Carrie Monast v. Albert Letourneau.**

1. **SHELLEY'S CASE**—*Application of the Rule in.*—If a legal estate is given to A, in trust for B, for life, and the legal remainder to the heirs of B at his death, the rule in Shelley's case can not apply, as the legal and equitable estates can not so coalesce as to give B either a legal or equitable fee.

**Bill of Interpleader.**—Appeal from the Circuit Court of Kankakee County: the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

W. R. HUNTER, attorney for appellant.

T. F. DONOVAN and T. W. SHIELDS, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was a bill filed by St. Viateur's College, a corporation located in Kankakee county, against the heirs of Noel Vasseur and others, asking that defendants be required to interplead, and that a decree be entered determining to whom of said defendants the college should pay a fund of \$1,066.67 remaining in its hands, with certain back interest thereon. By proper pleadings defendants set up the several claims to said fund hereinafter stated. The court heard proofs and entered a decree. The facts are undisputed, and are as follows:

On March 24, 1876, Noel Vasseur sold and conveyed to the college certain real estate in Kankakee county for \$3,200. The college paid him in cash \$2,133.33 thereon, and for the remaining \$1,066.67 executed and delivered to Noel Vasseur an instrument, the body of which was as follows:

"These articles of agreement, made this 24th day of March, 1876, between the corporation of St. Viateur's College of Bourbonnais, Illinois, of the first part, and Noel Vasseur and Fannie Vasseur, his wife, and the heirs of the said Noel Vasseur, of the second part, witnesseth, that whereas, the said Noel Vasseur and Fannie Vasseur have this

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day executed and delivered to said corporation their deed, thereby conveying to said corporation certain lots and parcels of land in the village of Bourbonnais, Illinois, as described in the said deed, for the consideration of \$3,200, of which consideration the said corporation has this day paid the sum of \$2,133.33, leaving unpaid the sum of \$1,066.67, as representing the dower interest of said Fannie Vasseur in the said lands, the said first party herein, in and for consideration of the aforesaid conveyance, does hereby covenant and agree with the second parties to pay to them the sum of \$1,066.67 aforesaid, with the interest thereon at the rate of ten per cent per annum in the manner following, to wit:

The said first party shall pay to the said Noel Vasseur, on the 24th day of March of each and every year during his natural lifetime, the interest of the said last named sum, at the rate aforesaid, to wit, the sum of \$106.67, and in case of the death of the said Noel Vasseur, leaving the said Fannie Vasseur surviving him as his widow, then said first party shall pay to the said Fannie Vasseur from and after the death of said Noel Vasseur, and for and during her natural life, on the 24th day of March in each year, the said sum of \$106.67 interest aforesaid, and at the death of the survivor of said husband and wife, then the said first party shall pay to the heirs of said Noel Vasseur the said sum of \$1,066.67, with all interest which may have accrued and then remaining unpaid thereon, at the rate of ten per cent per annum.

That said interest and principal shall be payable at said first party's office in the village of Bourbonnais, Ill.

The payment of the aforesaid interest and principal, according to the foregoing terms, is secured by the trust deed, executed by said first party, of the lands above referred to, bearing even date herewith."

The college secured the articles by a trust deed of said premises to George R. Letourneau, which recited that said instrument above set out was attached thereto. Said trust deed was evidently written upon a printed form, and contained provisions that in case of default in the payment of said moneys or interest, or any part thereof, the trustee might take possession and sell the premises and after paying expenses of sale, taxes, etc., "pay the principal and interest due on said articles according to the tenor and effect thereof," and, in another place, that in case of default in the payment of said

installments, or any part thereof, or interest, "the whole of said principal of said sum and the interest to the time of the sale, shall, at the option of the legal holder of said articles, become due and payable, and the said premises may be sold as if said indebtedness had matured." It also provided for a successor in trust.

Noel Vasseur died in 1879, leaving the following heirs at law: Carrie Monast, a daughter; Francis N. and Edward Perry, only children of Hattie Perry, a deceased daughter; Frederick Vasseur, a son; and Albert Letourneau, only child of Lucy Letourneau, a deceased daughter. Noel Vasseur left a last will, by which he gave all his property, real and personal, and his rights and credits of every name and nature which he might have at his death, to his son Frederick, subject to the legal rights and claims of testator's widow, Fannie. Frederick was named as executor. In 1884 Frederick Vasseur died testate, making his sister, Carrie Monast, his sole legatee and executrix. Fannie Vasseur, widow of Noel Vasseur, died February 5, 1899, and Edward Letourneau became administrator of her estate. The manual possession of the instrument above set out passed to Frederick when his father died, and when Frederick died it passed to Carrie Monast.

Carrie Monast claimed that the rule in Shelley's case applies to the contract above set out; that the words therein, "heirs of said Noel Vasseur," are words of limitation and not of purchase; that Noel Vasseur was therefore the owner of the entire principal fund; that by his will it passed to Frederick Vasseur; that by the will of the latter it passed to Carrie Monast. Francis N. and Edward Perry filed a disclaimer, admitting that Carrie Monast was sole owner of the fund, and asking that if the court found they had any interest therein, it be ordered paid to Carrie Monast. Albert Letourneau claimed that the principal fund belonged to those who, at the death of the widow, Fannie, should answer the description of "heirs of Noel Vasseur," and that as Frederick died before the widow, he took no interest which could pass by will to Carrie Monast, and therefore

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Albert Letourneau claimed for himself one-third of the fund, and that Carrie Monast was only entitled to one-third. Edward Letourneau, administrator of the estate of Fannie Vasseur, deceased, claimed the \$93.33 of interest earned but not due at the date of Fannie Vasseur's death. The decree gave Carrie Monast one-fourth in her own right, one-fourth in right of Frederick Vasseur, and one-fourth in right of the Perry children, and gave Albert Letourneau the remaining one-fourth; and denied the claim of Fannie Vasseur's administrator to the back interest. From that decree Carrie Monast prosecutes this appeal, claiming the entire fund, and Albert Letourneau assigns cross-errors, claiming one-third instead of one-fourth.

1. In our judgment the rule in Shelley's case does not apply to the instrument in controversy. There was no promise to pay the principal fund to Noel Vasseur and his heirs. There was no promise to pay any part of the principal fund to Noel Vasseur at all. There were three sets of persons named as the party of the second part, and to whom the promises were made, viz.: Noel Vasseur, Fannie Vasseur and the heirs of Noel Vasseur. There was first a promise to pay Noel Vasseur \$106.67 on the 24th day of March of each and every year during his natural life, that sum being the interest on the principal fund; there was, secondly, a promise to make like annual payments of \$106.67 to his wife from the date of his death during the rest of her life, if she survived her husband; and thirdly, a further promise after the death of both, to pay the heirs of Noel Vasseur the principal fund of \$1,066.67. This is very different from *Hobbie v. Ogden*, 178 Ill. 357, where the promise was to pay the trust fund "to Albert G. Hobbie or his heirs." This promise, as to the principal fund, is to pay the heirs only, and not to pay Noel Vasseur at all. In no contingency was the principal ever to be payable to Noel Vasseur. The words "the heirs of said Noel Vasseur" must be held to designate and apply to those who should answer that description at the death of Noel Vasseur; to those appointed by law to succeed to his estate if he died intestate.

(Kellett v. Shepard, 139 Ill. 433.) We are of opinion that the fact that this fund arose from the sale of real estate is unimportant; and that as to the question here involved the case stands in the same position as if Noel Vasseur had placed that amount of money in the hands of a trustee appointed by him, and had taken from the trustee an obligation to pay the income to himself for life, and thereafter to his wife for life if she survived him, and then to pay the principal fund to those who at his death would take his estate if he died intestate. We see no reason why the principle stated in Glover v. Condell, 163 Ill. 566, 588, does not apply, viz.:

“If the legal estate is given to A (the college) in trust for B (Noel Vasseur) for life, and the legal remainder to the heirs of B (the heirs of Noel Vasseur) at his death, the rule in Shelley’s case can not apply, as the legal and equitable estates can not so coalesce as to give B (Noel Vasseur) either a legal or equitable fee.”

We are of opinion that after Noel Vasseur placed this fund in the hands of the college, as trustee upon these express trusts, he no longer owned the principal fund, and could not revoke the trust nor release the trustee from its execution. If he had power to revoke the trust he never did so, and his will contains no reference thereto. The language of the trust deed securing said articles does not require a different construction. In case of foreclosure for non-payment of interest the moneys would not be payable to Noel Vasseur. The articles recite that the principal of \$1,066.67 represents the dower interest of Fannie Vasseur in said lands, and to pay the moneys to Noel Vasseur would defeat the evident purpose to protect her dower, which we may well assume she released because this arrangement was made. Moreover, the trust deed did not provide that in case of foreclosure the moneys should be paid to Noel Vasseur. Its direction to the trustee, in case of foreclosure, was “to pay the principal and interest due on said articles according to the tenor and effect thereof.” If at the time of such foreclosure Noel Vasseur and Fannie Vasseur were both dead, the payment, according to said articles, would be to



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the heirs of Noel Vasseur; but if either Noel or Fannie Vasseur were then living, the trustee could not pay the principal to them, because the articles did not provide it should ever be paid to them. In such case after foreclosure it would be the duty of the trustee in said deed to apply to a court of equity for the appointment of another trustee in place of the college, who would receive and invest the principal fund upon the same trusts already fixed. The decree of the court below enforces the trust Noel Vasseur established and the contract the college made in exact accordance with its terms. The position of appellant would prevent a father from creating such a trust for the benefit of his heirs unless he chose to name them specifically.

2. If the rule in Shelley's case be applied to the interpretation of said articles, yet that rule is subject to the qualification that, though often applied to grants of personalty by way of analogy, for purposes of construction, yet when so applied it yields more readily to the apparent intention of the grantor than it does in grants of realty. (*Glover v. Condell, supra.*) The words in said instrument, "at the death of the survivor of said husband and wife, then the said first party shall pay to the heirs of said Noel Vasseur the said sum of \$1,066.67, with all interest which may have accrued and then remaining unpaid thereon, at the rate of ten per cent per annum," express the intent of the college, and also the intent of Noel Vasseur, who made the arrangement and procured the execution of the articles. We think the intent of both Noel Vasseur and the college is clear, and has been carried into effect by the decree.

3. The manual possession of the articles was immaterial. There were several beneficiaries thereunder. Only one beneficiary at a time could be custodian of the instrument. Whichever one had it necessarily held it for the benefit of all. It was consistent that Noel Vasseur should first hold it, as he was first to receive benefits under it. After his death it might properly have been lodged with his widow, the next one entitled to moneys thereunder; but Frederick Vasseur was one of the beneficiaries, and his possession of

the instrument could not be hostile either to Fannie Vasseur or to his co-beneficiaries in the principal fund; and the same is true of the later possession by Carrie Monast, both because she was one of the beneficiaries in her own right, and because she acquired the rights of Frederick Vasseur by his will.

4. The death of Noel Vasseur fixed the persons who were his heirs, and who were ultimately to take, and their interests were then vested, though the time when they should take was deferred by the fact that Fannie Vasseur survived her husband. Hence Frederick Vasseur acquired a vested legal interest in the principal fund, and it accordingly passed to his legatee, Carrie Monast. The decree is therefore affirmed.

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**Matilda Ebner, Adm'x, v. A. N. Mackey.**

1. **PHYSICIAN**—*The Sole Judge of the Frequency of His Visits.*—A physician attending a patient is the proper and sole judge of the necessary frequency of the visits to his patient, so long as the patient is in his charge, and in an action for his services he is not required under the law to prove the necessity of his making the number of the visits he makes and for which he is seeking compensation.

**Assumpsit**, for physician's services. Appeal from the Circuit Court of Mercer County; the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

CONNELL & THOMASON, attorneys for appellant.

COOKE & MAIN and BROCK & GRAHAM, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was a claim filed by appellee, a physician, against the estate of Andrew Ebner, deceased, for medical services rendered Ebner and his wife. The claim as sworn to and

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lodged with the county clerk for filing, was for \$370. Before claim day \$50 was paid thereon. At the trial in the Circuit Court before a jury, on an appeal from the County Court, said credit was allowed and a verdict and judgment was entered for \$320. The administratrix appeals.

Complaint is made of the rulings of the trial court in the admission and rejection of testimony. No exception was preserved to any of these rulings, and their correctness is therefore not presented to us for decision. On the motion of defendant for a new trial, it was assigned, as a ground for granting a new trial, that the verdict was contrary to the law and the evidence. No reason is shown why the verdict is contrary to law. There was much conflicting evidence as to whether all the services charged for were rendered, and as to whether the services rendered had not been settled for by Ebner in his lifetime. The jury determined these questions for claimant, and there was evidence to support the verdict. The books of claimant were in evidence, showing charges from day to day, and time to time, during a period of several years, in which time it is conceded claimant did often attend upon the parties professionally, and especially upon Mrs. Ebner. One witness for defendant gave certain dates in the summer of 1897 between which she testified Ebner and wife were in Colfax, Iowa. During this period the claimant's books contained several charges against deceased, and it is argued that the jury should in any event have disallowed those charges. The jury saw this witness and heard her testimony. She was contradicted by the daily entries in claimant's books. There was a shorter period, the same summer, during which the books contained no charges against deceased. Some doubt was thrown upon the correctness of the dates given by the witness by the testimony of another witness for defendant, who at two different times lived in the Ebner family, but did not live there during the summer of 1897, and yet remembered the fact of Mr. and Mrs. Ebner going to Colfax. The jury evidently concluded the witness was mistaken, either as to the date or length of the stay at

Colfax. We are unable to say they were wrong, or that another jury would reach a different conclusion upon the same evidence.

The court gave the following instruction for claimant:

"The jury are instructed as a matter of law that the physician attending a patient is the proper and sole judge of the necessary frequency of the visits to his patient, so long as the patient is in his charge. And in an action for his services the physician is not required under the law to prove the necessity of his making the number of visits that he makes and for which he is seeking compensation."

Upon this subject Wood on Master and Servant, Section 177, says:

"A physician is to be deemed the proper judge of the necessity of frequent visits to his patient, and the court will presume that all the professional visits made by him were necessary. Hence, in an action for his services, he is not called upon to prove the *necessity* of making the number of visits he did. The physician being responsible for the want of care, and faithful attention to his patients, a contrary rule would work great hardship to him, and subject him to undue perils."

To the same effect is *Todd v. Myers*, 40 Cal. 357. *C. B. & Q. R. R. Co. v. George*, 19 Ill. 510, does not, as supposed, announce a contrary doctrine. There a person injured in a railroad collision brought suit for damages, and sought to recover among other things his expenses for medical attendance. Of course he could not recover against the railroad company for all medical attendance he had chosen to have, but only for such as was necessary in curing his injuries. But where a physician is called by a party to treat him or his wife, and he takes charge of the case and attends from day to day, evidently, in view of his responsibility for skillful and proper treatment, he must in the first instance determine how often he ought to visit the patient, and so long as the party employing him accepts his services and does not discharge him or require him to come less frequently, or fix the times when he wishes him to attend, he can not afterward be heard to say the physician came oftener than was necessary. There was no proof claimant

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came when he was forbidden to come, or that he was discharged and continued to attend thereafter. Deceased and his wife called claimant and accepted his services without question. Under the circumstances of this case the instruction was proper.

Some expressions in other instructions given for claimant may have been slightly inaccurate, but they were substantially correct. The jury were fully instructed for defendant. The instructions asked by defendant and refused, so far as not embraced in given instructions, were either erroneous or so involved or confusing as to warrant their refusal. We find in the record no reversible error.

The judgment is therefore affirmed.

Covenant Mutual Life Association v. Louisa J. Tuttle.

1. **BENEFICIARY ASSOCIATIONS**—*Assessments to be in Accordance with the Original Contract.*—Assessments in fraternal insurance associations must be made in accordance with the terms of the original contract of the member.

2. **SAME**—*Burden of Proof—Legality of Assessments.*—The burden of showing the legality of an assessment of a fraternal insurance association, and the power of the officers to make it, is upon the association.

3. **SAME**—*Burden of Proving a Forfeiture.*—The burden of proving a forfeiture of a member's certificate for non-payment of an assessment is upon the association.

4. **SAME**—*What Constitutes the Contract of Insurance.*—Where the indorsements upon the certificate of membership, and made a part thereof, expressly provide that the application for membership and the certificate "shall constitute the complete and only contract" between the certificate holder and the association, such application and certificate constitute the contract.

5. **SAME**—*By-laws May be Made a Part of the Contract.*—It is undoubtedly competent for parties to make contracts with reference to the by-laws then existing, or which might thereafter be adopted, and when such contracts are so made, such by-laws become a part of the contract.

6. **SAME**—*Right to Make Changes in By-laws.*—Where the contract contains an express provision reserving the right in the association to amend or change its by-laws, it will have the right so to do; and where

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in a certificate of membership it is provided that members shall be bound by the rules and regulations then governing the council or fund, or that might thereafter be enacted for such government, and such conditions are assented to, and the members accept the certificate upon such conditions, it is a sufficient reservation of the right in the society to amend its by-laws.

7. *SAME—By-laws as a Part of the Contract.*—The better opinion is, if it is conceded that by-laws in force when the certificate is issued enter into and become a part of the contract, that it is only those then in existence; and that the society has no right, by amending or repealing any of them, without the consent of the certificate holder, and in the absence of any such right reserved in the contract, to impose new conditions or burdens, affecting the contract to his injury, or by a new provision, passed after the making of the contract, to forfeit his rights under it.

8. *SAME—Rights of Members.*—In a contract of mutual benefit insurance the member acts for himself and not as a part of the society; his rights rest upon his contract of insurance, and not upon his contract of membership in the society. A corporator in a mutual benefit society, like a stranger, may enter into a contract of insurance with it, and his rights under the contract will be as fully protected as those of a stranger.

9. *ESTOPPEL—In Pais, Arises When.*—Equitable estoppels, or estoppels *in pais*, only arise where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position; the former is concluded from averring against the latter a different state of things as existing at the same time.

10. *SAME—By Paying Illegal Assessments.*—A member of a fraternal insurance association, in paying previous illegal assessments, can not be said to have acted fraudulently, or willfully done anything calculated to mislead others to their injury, so as to estop himself from questioning subsequent illegal assessments.

11. *EVIDENCE—Opinions of Insurance Actuaries.*—Opinions of insurance actuaries and reports of insurance commissioners of various States are not competent evidence in an action against a fraternal insurance association of this State on a beneficiary certificate.

Assumpsit, on a certificate of membership in a fraternal insurance association. Appeal from the Circuit Court of Winnebago County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

T. A. MORAN, GEO. W. WALL and WM. C. CALKINS, attorneys for appellant.

The certificate in evidence was not the entire contract

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between the defendant company and the assured. The by-laws of the association in existence at the time such contract was made, entered into and form a part of the contract, even though not referred to in the certificate, and as those by-laws then in force reserved the right to the company to change and amend the same, the certificate holders must necessarily be bound by all subsequent amendments to the by-laws affecting the obligations of this contract. 3 Am. & Eng. Ency. of Law, 2d Ed., 1064-1081; Bliss on Life Ins., 2d Ed., Sec. 463; May on Ins., 3d Ed., 552; Niblack on M. B. Ins., 2d Ed., Sec. 136; Bacon on M. B. Socs., 160; C. M. B. A. v. Spies, 114 Ill. 468; Rv. P. Ass'n v. Robinson, 147 Ill. 138; Fullenwider v. Royal League, etc., 73 Ill. App. 321; Barbot v. M. R. F. L. A., 100 Ga. 681; Sup. Lodge K. P. v. Knight, 117 Ind. 489; Poultney v. Bachman, 31 Hun, 49; Stohr v. M. F. Soc., 82 Cal. 557; Pfister v. Gerwig, 122 Ind. 567; B. M. Ins. Co. v. Van Winkle, 12 N. J. Eq. 333; Miller v. Hallsborough M. F. Ins. Ass'n, 42 N. J. Eq. 459; Davidson v. Old People's M. B. Soc., 39 Minn. 303; Figure v. St. Joe M. Soc., 46 Vt. 369; St. P. Soc. v. McVey, 92 Pa. St. 510; Susquehanna Ins. Co. v. Perrine, 7 W. & S. 348.

The business of life insurance, and particularly of insurance by mutual insurance associations, is subject to be controlled by the State, and the State may impose such duties and obligations upon such associations as will require them to change their method of assessment and modify their contracts with their policy holders. Hunt v. Le Grand Roller Skating Rink Co., 143 Ill. 118; Lehman v. Clark, 174 Ill. 279; Act of 1893, Hurd's Statutes of 1898, p. 960.

The original plan of post-mortem assessments adopted by this company having proved a failure, and it having been demonstrated that the association would become bankrupt if it continued upon the original plan, it was the duty of the association to adopt such changes from time to time as would keep the corporation solvent and enable it to go on to accomplish the purpose of its creation. Bruce v. The Continental Life Ins. Co., 58 Vt. 253; Seymour v. M. R. F. L. A., 35 N. Y. Sup. 793; Figure v. The St. Joseph Mutual

Society, 46 Vt. 369; *Stohr v. The Mutual Fund Society*, 82 Cal. 557; *Fullenwider v. The Royal League*, 73 Ill. App. 321.

By assenting to and acquiescing in all the changes made by the association from 1890 to 1897, and continuing to pay for his insurance upon a plan entirely different from the one specified in his certificate, the assured induced the company to place itself in a position where it could no longer comply with the strict letter of his certificate and induced all the persons who became members after 1890 to do so upon the presumption that he acquiesced in and assented to the power of the company to make such necessary changes in their plan of insurance, and to so modify his original certificate as to enable the company to collect from him the actual cost of his insurance, and by so doing he estopped himself from insisting that the company had no right to assess him on other than the original basis, and from holding the company liable where he elected not to pay an assessment regularly made, and which did not exceed the cost of his insurance. The doctrine of estoppel is constantly applied at law, except when permanent interests and land would be affected. *Herman on Estoppel*, Chap. 44, Sec. 1297 *et seq.*; *Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 523; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Lycoming Fire Ins. Co. v. Dunmore*, 75 Ill. 14; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Board of Supervisors v. City of Lincoln*, 81 Ill. 156; *Martel v. East St. Louis*, 94 Ill. 67; *Goeing v. Out-house*, 95 Ill. 346; *Fire Ins. Co. v. Oberholser*, 172 Pa. State, 232.

FISHER & NORTH, attorneys for appellee.

The issuance of a certificate is evidence of good standing which is presumed to continue until the contrary is shown, and the burden of proof to establish forfeiture by competent evidence is on the association, and the association must show by competent evidence that the assessment upon which they seek to avoid the certificate was valid. *Ind. Order of Foresters v. Zak*, 136 Ill. 185; *N. W. Trav. Men's Ass'n v. Schauss*, 148 Ill. 304, and 51 Ill. App. 78;



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Kumle v. Grand Lodge, etc., 110 Cal. 204, 42 Pac. 634; Tobin v. Society, 72 Ia. 261, 33 N. W. 663; Spencer v. Ass'n, 37 N. E. 617; Tourville v. B. of L. F., 54 Ill. App. 77; Bagley v. A. O. U. W., 46 Ill. App. 411; Bacon on Life Ins., Sec. 377; Niblack on Mut. Ben. Soc's, (1st Ed.), Sec. 280.

Forfeitures are not favored in law, and in order to work a forfeiture of the rights of membership in a mutual association, it must clearly appear that such was the meaning of the contract, and the facts upon which the forfeiture is claimed must be proved by the most satisfactory evidence. The certificate of membership must be construed liberally in favor of the assured. Order of Chosen Friends v. Austerlitz, 75 Ill. App. 74; Protection Life Ins. Co. v. Foote, 79 Ill. 369; Benefit Ass'n v. Tucker, 157 Ill. 194; Union Mutual Acc. Ass'n v. Frohard, 33 Ill. App. 179, and 134 Ill. 228; Polish R. C. U. v. Warczak, 82 Ill. App. 351; Hardesty v. Forest Ins. Co., 77 Ill. App. 413; Healey v. Acc. Ass'n, 133 Ill. 556.

The certificate introduced in evidence and the application comprise the entire contract between defendant company and the assured. Cov. Mut. Life Ass'n v. Baldwin, 49 Ill. App. 203; Royal Temp., etc., v. Curd, 111 Ill. 284; Com. Acc. Co. v. Bates, 176 Ill. 194; Ind. Order of For. v. Zak, 136 Ill. 185.

The contract of insurance made with a mutual company does not differ essentially from the ordinary contract of insurance with a stock company, where the contract or policy is complete in itself; that is, where the liability of the company is fixed by the policy or membership certificate, and the insured does not depend upon the by-laws to determine the nature and amount of his insurance. In the latter case, it has been seen that the association could generally, by the amendment of the by-laws, alter or vary the terms of the contract, and in the former case no such right is reserved to the association, and it becomes as perfectly bound by the terms of that contract, as it would if made with a stranger. N. E. and Mut. Fire Ins. Co. v. Butler, 34 Me. 451; Warnebold v. Grand Lodge, etc., 83 Ia. 27;

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N. W. Ben. and Mut. Def. Ass'n of Ill. v. Wanner, 24 Ill. App. 357.

A provision in the certificate will prevail over a clause in the by-laws, no charter restrictions being violated. 3 Am. and Eng. Encl. of Law (2d Ed.), 1083; Hale v. Equit. Def. Union, 168 Pa. St. 377; Fitzgerald v. Equit. Relief Fund Ass'n, 2 N. Y. Sup. 214; Benefit Societies and Life Ins. (Bacon), Sec. 161 A.

Failure to pay excessive assessments not provided for in the certificate does not forfeit same, and payments of previous excessive assessments do not waive right to refuse to pay similar excessive assessments, and assessments made in violation of the contract of insurance are invalid, and no forfeiture can be declared for failure to pay illegal assessments. Farmer's Mut. Fire Ins. v. Knight, 162 Ill. 470; Cov. Mut. Ben. Ass'n v. Baldwin, 49 Ill. App. 203; Morgeson v. Mass. Ben. Ass'n, 42 N. E. 1132; Langdon v. Mass. Ben. Ass'n, 44 N. E. 226; Benton v. Brotherhood, 146 Ill. 570.

The association could not modify or change the contract of insurance without the express consent of the insured, after the receipt of the certificate. Ill. Con. Female College v. Cooper, 25 Ill. 148; 5 Am. and Eng. Encl. of Law (2d Ed.) 96; Startling v. Supreme Council, etc., 66 N. W. 340; Wheeler v. Iron Hall, 68 N. W. 229; Cov. Mut. Ben. Ass'n v. Baldwin, 49 Ill. App. 203; S. F. R. M. v. Hammers, 81 Ill. App. 560; 3 Am. and Eng. Encl. of Law (2d Ed.) 1084.

But parties may contract with corporations in reference to laws of after enactment, and may engage to be bound and affected thereby. 5 Am. and Eng. Encl. of Law (2d Ed.), page 97.

The act of 1893 relating to benefit societies has no retroactive force, and does not apply to certificates issued by a society prior to its re-organization under that act. Moore v. Guaranty Fund Life Soc., 178 Ill. 202; Voigt v. Kernsten, 164 Ill. 314; Benton v. Brotherhood, 146 Ill. 570; Bastian v. Modern Woodmen, 166 Ill. 595; Rowell v. Cov. Mut. Life Ass'n, 176 Ill. 557; Moore v. Chicago G. F. L. Soc., 76 Ill. App. 433; Roxbury Lodge, etc., v. Hawking, 38 Atl. Rep. 693.

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Opinions of actuaries and reports of commissioners of insurance of various States, are not competent evidence. *Bagley v. Grand Lodge, etc.*, 131 Ill. 498.

Where the contract provides that upon the death of a member an assessment shall be levied upon the members to pay the claim, no assessment can be made in anticipation of losses, and while there is money on hand with which to pay all losses accrued. *Niblack on Mut. Ben. Soc.*, Sec. 283; *Cov. Mut. Ben. Ass'n v. Baldwin*, 49 Ill. App. 203.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of assumpsit brought by appellee against appellant to recover the amount claimed to be due upon a beneficiary certificate issued by appellant upon the life of Isaac C. Tuttle, now deceased, and in which certificate appellee was named as the beneficiary.

It was averred in the declaration that on March 4, 1879, appellant executed and delivered to said Isaac C. Tuttle a certificate of membership in the defendant association for the sum of \$5,000, and that thereafter said certificate was surrendered, and by mutual agreement between the parties the amount was reduced one half, and a new certificate issued, which constituted said Isaac C. Tuttle a member of said association with all the rights and privileges of the same, and provided that "upon due notice and satisfactory proof of the death of the aforesaid member having been filed with the secretary of the association, he having in all respects complied with the conditions of said certificate, an assessment shall be made upon all the members liable at the time of the death of said member" for a sum sufficient to meet the amount named in the certificate (\$2,500), to be paid to Louisa J. Tuttle as beneficiary; which certificate was issued by the association and accepted by said Isaac C. Tuttle upon the express conditions and agreements set forth on the back thereof, which were made a part of the contract. The certificate, together with the conditions printed thereon, being twelve in number, as well as the

application, were all set out in full in the declaration. It was further averred that during his life said Isaac C. Tuttle kept and performed all the conditions of his contract by him to be kept and performed, to keep said certificate in full force and effect, and that he died October 29, 1898, being still a member of said association, and his certificate in full force and effect. It is further averred in the first count that after the death of said Tuttle proofs of death were duly made and filed with the association, and it thereupon became its duty to make an assessment upon its members to pay the amount of such certificate, and that on December 1, 1898, it did levy such an assessment and collected therefrom the sum of \$2,500. In the second count it is alleged such an assessment was made and that it was sufficient to realize the sum of \$2,500.

By an additional count the duty of appellant to make the assessment is charged and it is averred that such an assessment would realize a sum greatly in excess of the amount necessary to pay the sum mentioned in the certificate, and that the defendant failed and refused to make such assessment.

The pleas were, first, the general issue; second and third, that the said Isaac C. Tuttle failed to pay assessment No. 149 for \$46.93, which was properly levied March 1, 1898, whereby his certificate became null and void. The fourth plea (designated in the record as the third special plea) averred that the legislature of the State of Illinois in 1893 passed an act to incorporate companies to do the business of life and accident insurance upon the assessment plan, and to control such companies in this State, which act was approved and in force June 22, 1893; that the defendant on August 1, 1893, reincorporated under said act, and has since that time been conducting its business under and within the provisions of the same; that one of the conditions of said act provided "that the trustees, directors, managers or persons designated in the by-laws of the corporation, subject to the provisions of this act, shall fix the fee, rate, amount of premiums, assessments, or periodical calls, and

the time and manner of payment thereof, and the risk to be assumed by such corporation and the duration thereof, and may change the same from time to time as the experience of the corporation may require;" that on March 1, 1898, the directors levied call No. 149 against the certificate of Isaac C. Tuttle, under and by virtue of the by-laws of said defendant association adopted pursuant to such re-incorporation under said act, for the sum of \$46.93, which sum was for one of the six bi-monthly assessments authorized by the certificate, and was no more than was necessary to cover the cost of insurance enjoyed by said Isaac C. Tuttle under and by virtue of his said certificate, and that said Tuttle failed to pay the same within the time limited, and his certificate became null and void.

The plaintiff took issue upon the first, second and third pleas and demurred to the fourth. The demurrer was sustained to the fourth plea, and the defendant elected to abide by its plea.

We have thus set out the substance of the pleadings at some length, in order that it might clearly appear what were the issues involved in the trial of the cause.

By agreement of parties a jury was waived and the cause tried by the court. The issues were found for the plaintiff, the damages assessed at \$2,531.25, and judgment entered against appellant for that amount. The proper exceptions were saved and defendant appealed to this court.

The principal errors assigned and relied upon by appellant are:

That the court found and held that assessment No. 149 levied against the certificate of Isaac C. Tuttle was illegal and void, and not binding upon appellee.

That the court refused to hold as the law of the case the propositions of law from one to seven inclusive, presented by appellant.

That the court erred in finding that the re-adjustment of rates made by appellant, upon which assessment No. 149 is based, was illegal and void.

And that the court erred in not finding that appellant

had the right to raise the assessment against the certificate of Isaac C. Tuttle and others, to a sufficient amount to enable it to pay its mortuary liability.

Other errors are assigned but do not appear to be relied upon in argument, and therefore need not be considered.

The whole controversy in the cause turns upon the proposition as to whether or not appellant had the right to levy assessment No. 149 against the certificate of Isaac C. Tuttle, which it is conceded was a large increase over any other assessment he had ever been called upon to pay, and very much in excess of the assessments specified and agreed upon in the original contract.

It is not claimed that the assured ever failed or refused to pay any other assessment levied against his certificate nor that he was in default in any other matter except the non-payment of assessment No. 149, for which his certificate could be forfeited.

No question is made as to the death of Isaac C. Tuttle, nor as to the sufficiency of the proofs of death, but appellant denies all liability for the reason that assessment No. 149 was never paid, and it insists that the certificate was thereby forfeited, null and void, at the date when the assured died.

On the other hand it is contended by appellee that assessment No. 149 was illegal; that appellant had no right, power or authority to make the same, and that its non-payment by Tuttle was not a ground for declaring a forfeiture of his certificate. In his oral argument before this court, counsel for appellant stated that the question here involved was one of first impression, and it becomes important, therefore, that it be carefully considered, to the end that a proper conclusion be arrived at.

It appears from the evidence that appellant was originally incorporated January 9, 1877, under the general laws of 1872 of this State, by the name of "Covenant Mutual Benefit Association," as a corporation not for pecuniary benefit; the object being to furnish financial aid to the widows and families of deceased members; that it was re-incorporated

under the act of 1893, and the name changed to "Covenant Mutual Life Association."

The general plan of operations, as shown by the first set of by-laws, constituted each certificate holder a member of the association, and provided that upon the death of a member an assessment should be made upon the surviving members of a fixed amount, which, being collected, should be paid over to the beneficiary named in the certificate.

The certificate holders were divided into five groups, according to age; the rates running from seventy-five cents for the first group up to \$2 for the fifth. Assessments of these amounts were made bi-monthly on each of the members respectively, according to the group in which they were placed, and these assessments, together with a small amount for expenses, were the whole cost of the insurance according to the original plan.

The certificate involved in this suit (or the original for which this is a substitute), was issued to Isaac C. Tuttle March 4, 1879, he being then upwards of fifty-eight years old, which brought him into the fifth group.

The first of the conditions upon the back of the certificate, which are expressly made a part of the contract, reads as follows:

"1st. The person on whose application this certificate of membership is issued, hereinafter called the certificate holder, agrees to pay a mortuary assessment of \$2 on the death of each and every member of this association occurring subsequent to the date of this certificate, or such proportional part thereof—all members being assessed ratably according to the certificate held by each—as may be necessary to secure an aggregate amount, not less than the sum required for the payment of the claim; and further agrees to pay all assessments which may from time to time be levied by the directors or managers for expenses and collection costs, not exceeding twenty-four cents per month, reckoned from the date of certificate, or last assessment collected, and further agrees that the aforesaid assessments shall be paid to the said association at its principal office in Galesburg, Illinois, within thirty (30) days from the date on which the notice relating thereto bears date, and the failure to pay such assessment, as above provided, or any one of them, or any part thereof, shall render this certificate null and void."

The second condition is as follows:

"2d. It is mutually agreed by and between the association and this certificate holder, that there shall be six assessments and six only, issued each year, which assessments shall cover the entire cost of insurance, and include mortuary, expense and collection costs, and be issued on the first day of January, March, May, July, September and November each year, and close thirty (30) days from date."

The twelfth condition contains the following:

"12th. It is expressly understood and agreed that the application for membership bearing even number herewith, and this certificate, shall constitute the complete and only contract between said certificate holder and this association, and shall be subject to and construed only according to the laws of Illinois, the place of this contract." \* \* \*

It appears that all policies issued by the association prior to 1890 were substantially the same as the one under consideration, and until that year the association assessed its certificate holders according to the terms of their contracts as set forth in the certificates, except that some additional assessments were levied for the purpose of accumulating a reserve fund, which fund on January 1, 1890, amounted to \$343,433.86. At that time the association ceased issuing policies or certificates providing for post mortem assessments; the by-laws were amended February 9, 1890, and the society commenced to assess, not only to pay death losses, but to create a permanent or contingent fund.

In 1895 another change was made in the by-laws and in the manner of making assessments. The group plan was abandoned, and each certificate holder was assessed according to his age at the time he became a member of the association, according to the ordinary life insurance rates, and each assessment under this plan produced a sum in excess of \$100,000, being an amount largely in excess of what was necessary to pay death losses; the purpose being to create a permanent or contingent fund.

In 1898, another, and still more radical change was made in the rates and manner of making assessments. The association then commenced to assess the certificate holders, not according to the group plan, and not according to the age



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at the time of entry into the society, but according to the attained age at the time of the assessment, based upon the cost of insurance as estimated from past experience by the actuaries in old line insurance companies.

Assessment No. 149 was made upon this basis, and instead of being assessed \$2, and the small costs provided for, Tuttle was called upon to pay \$46.93 as one of the bi-monthly payments upon his reduced certificate of \$2,500; and this amount he was informed he would be required to pay six times a year, making a total of \$281.58 for the year as against \$26.88, which was the extreme limit of the amount he agreed to pay under the original contract.

As we understand it, the intention and expectation of the association was, to increase the amount of such payments from year to year as the certificate holder attained a greater age. It will be seen at once that this was a complete departure from the original scheme and plan of the society as it existed when Tuttle became a member and received his certificate. The payments called for were no longer assessments to pay death losses, but became bi-monthly payments, having no regard to the number of deaths which had occurred in the society, but based entirely upon the actuary's estimates or theory as to what it would cost to insure a man at the age attained when the so-called assessment was made. At the same rates, if in good health, Tuttle could have entered and been insured in any old line insurance company organized on the stock plan.

It clearly appears, therefore, that this assessment No. 149 was not in accordance with the terms of the original contract, and we think the burden of showing its legality and the power of the officers of the association to make it, devolves upon appellant, because the law is well settled that the burden of proof to establish a forfeiture, by competent evidence, in such a case as this devolves upon the society. (Ind. Ord. of Foresters v. Zak, 136 Ill. 185; N. W. Travel Men's Ass'n v. Schauss, 148 Ill. 304; Bagley v. A. O. U. W., 46 Ill. App. 411; Tourville v. B. of L. F., 54 Ill. App. 77. See also Farmers Fire Ins. Co. v. Knight, 162 Ill. 470.)

The argument of counsel for appellant in support of the legality of the assessment proceeds upon the theory that the underlying idea of these fraternal benevolent associations is that of absolute equality in the burden of providing the funds *pro rata* to benefits to be received, and the equality of benefits to be received *pro rata* the burden borne by those contributing to the fund; that a scheme was devised in the appellant corporation, which the governing body and its members believed would provide a sufficient fund to pay all the insurance or death losses as they occurred; that experience has demonstrated it will not do so; that the necessity of seeing decreasing membership and possible disruption of the society unless some change were made, became apparent to the governing body, and it resolved therefore to change the by-laws as to rates, by increasing them; that the law which governs such organizations and their members, and the details of their relations to each other, are expressed in their by-laws, and that such by-laws are in fact the constitution of the society, and that all contracts made by the association must be made with reference to such by-laws. It is contended that at the time the certificate in suit was issued, the by-laws of the association provided that they should be subject to amendment; that the by-laws formed part of the contract, and the contract therefore provided that it should be subject to amendment. The argument is certainly ingenious, but it seems to us it entirely overlooks the fact that the twelfth condition indorsed upon the certificate, and made a part thereof, expressly provides that the application for membership and the certificate, "shall constitute the complete and only contract" between the certificate holder and the association. If this language means anything, it certainly means what it says, and excludes any idea that the by-laws are to be looked to as a part of the contract. It would undoubtedly have been competent for the parties to have contracted with reference to the by-laws then existing, or which might thereafter be adopted, and when such contracts have been made they have been held binding.

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The case of Fullenwider v. Royal League, 180 Ill. 621, cited by appellant, and much relied upon, was such a case. But that case is clearly distinguishable from the one under consideration, for the reason that the certificate issued to Fullenwider expressly provided he should comply thereafter "with the laws, rules and regulations now governing said council and fund, or that may hereafter be enacted by the supreme council to govern said council and fund, all of which are made part of the contract," etc. In deciding that Fullenwider was bound by this contract the opinion of the majority of the court says:

"The power to enact by-laws for the government of a corporate body is an incident to the existence of a body corporate and is inherent in it. The power to make such changes as may be deemed advisable is a continuous one. Where the contract contains an express provision reserving the right to amend or change by-laws, it can not be doubted that the society has the right so to do; and where, in a certificate of membership, it is provided that members shall be bound by the rules and regulations now governing the council or fund, or that may thereafter be enacted for such government, and those conditions are assented to and the member accepts the certificate under the conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws."

The decision of that case clearly turned upon the fact that Fullenwider had contracted to be bound by the by-laws of the society then in force, or which might thereafter be enacted. In the case at bar there is no such reservation in the contract. On the contrary the application and certificate constitute the complete and only contract between the certificate holder and the defendant corporation. Hence we do not regard the Fullenwider case as being of controlling force in the decision of the question now before us.

It is contended by counsel for appellant that the by-laws in existence at the time the contract was made, entered into and formed a part of the contract, even though not referred to in the certificate, and that as those by-laws then in force reserved the right to the society to change and amend the same, the certificate holders must neces-

sarily be bound by all subsequent amendments to the by-laws affecting the obligations of the contract. Various authorities are cited, some of which certainly seem to support this view. But we think the better opinion is, even if it were conceded that the by-laws in force when the certificate was issued entered into and became a part of the contract, yet it was only those then in existence, and that the society has no right, by amending or repealing any of them, without the consent of the certificate holder, and in the absence of any such right reserved in the contract, to impose new conditions or burdens affecting the contract to his injury, or by a new provision passed after the making of the contract, to forfeit his rights under it. "The rights of the members stand entirely free from such control. In a contract of mutual benefit insurance the member acts for himself, and not as a part of the society; his rights rest upon his contract of insurance, and not upon his contract of membership in the society. A corporator in a mutual benefit society, like a stranger, may enter into a contract of insurance with it, and his rights under the contract will be as fully protected as those of a stranger." (Niblack on Ben. Soc., 2d Ed., Sec. 136, p. 273; N. W. Ben. & Mut. Aid Ass'n v. Warner, 24 Ill. App. 357; Ins. Co. v. Conner, 17 Pa. St. 136.)

In *Cov. Mut. Ben. Ass'n v. Baldwin*, 49 Ill. App. 203, which was an action against appellant in this suit to recover upon a similar certificate to the one here involved, and which had been issued upon the life of John H. Baldwin, it would seem from the language of the opinion that the contract there, as here, was contained in the application and the certificate, and it was held that so long as the assessments were made accordingly, the certificate holder was bound to pay them, and a failure therein would work a forfeiture; but that the directors could not, without his consent, change the contract.

We are of the same opinion, and without discussing that question further we hold that assessment No. 149 was levied without authority of law in contravention of the contract with Isaac C. Tuttle, and that a failure on his part to

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pay it did not work or authorize a forfeiture of his certificate.

Much evidence was introduced upon the trial, over the objection of appellee, tending to show that the association could not remain solvent, continue to do business and pay death losses upon its outstanding certificates under the original plan which was in operation when the certificate was issued to Tuttle. It may perhaps be conceded, if that evidence is competent, that the proofs show the contract made with Tuttle and its other certificate holders prior to 1890, were improvident contracts; that the plan of insurance was faulty and would not meet the expectations of its founders. We are of opinion this evidence was not competent, but if it were, we do not see how the facts proven relieve appellant from liability. If, as we hold, the contract was valid and binding, and the society had no right of its own volition and without the consent of Tuttle to change it, we fail to see how the fact it had made an improvident contract based upon a false idea of its ability to carry on an insurance business as contemplated in the original plan can relieve it from liability to carry out the contract so far as it has the power, or furnish a warrant for the largely increased assessment complained of in this case.

It is to be observed that the society did not promise or guarantee to pay the beneficiary any particular sum on the death of the certificate holder. What it did agree to do in that event, was to levy an assessment upon its members and pay over to the beneficiary the proceeds of such assessment, not exceeding the sum named in the certificate. It may be that in time, as the death losses increased, the beneficiaries of the members outliving their fellows would not receive the full sum mentioned in their certificates, because of a failure of the assessments to realize the necessary amounts. This we believe to have been the experience of many of these so-called co-operative insurance associations. But granting that such a result would follow, still the society could keep its contract by levying an assessment upon the death of a member

as it agreed to do, and paying over to the beneficiary the avails thereof, however small the sum might be. That his beneficiary might not receive the full amount named in the certificate, if the holder thereof outlived his fellow members, was one of the chances he took when he entered into the contract and accepted that kind of insurance. And even that result would seem to be more favorable or desirable than that the certificate holder should be called upon to pay assessments more than ten times as great as he contracted to pay, and in default of such payments have his certificate declared absolutely forfeited; and that, too, when he had become an old man, and when perhaps from his inability to earn money it would be impossible for him to pay the increased assessments.

Take the case at bar as an illustration: Tuttle was in his fifty-ninth year of age when he became a member of the society and received his certificate on March 4, 1879. He paid all assessments levied against his certificate for about nineteen years, and up to the levy of No. 149, which he refused to pay. He was at this time nearly seventy-eight years old and had paid into the society, as the evidence shows, \$1,837.96. On his original certificate of \$5,000 he had contracted to pay not exceeding \$26.88 per year, while on the certificate reduced to \$2,500 he was required to pay \$281.58 per year, or go out of the society and have his certificate forfeited; being thus left in his old age without a dollar of insurance, at a time of life when it might be doubtful as to his being able to procure it elsewhere.

It seems to us that a bare statement of these facts is sufficient to show the wrong and injustice of the assessment No. 149. It is no wonder that over 22,000 members of appellant society went out of the association during the year 1898 nor that after the levy of assessment No. 149, 16,432 of the members' certificates were forfeited for non-payment of this assessment.

Even though the power to make a change in the contract were conceded to appellant, we would be disposed to hold that such a radical change as this, which tended to

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produce such apparent injustice and hardship, was so unreasonable and oppressive as to be void, and of no binding force upon the certificate holders.

Counsel for appellant seem to place a good deal of reliance upon the act of the general assembly approved and in force June 22, 1893 (Hurd's Stat. 1897, p. 960), governing associations such as appellant, as giving the corporation, by Sec. 5, the power to fix rates and assessments, and by Sec. 8, requiring it to accumulate an emergency fund. But it has been expressly held that the act of 1893 above referred to has no retroactive force, and does not apply to certificates issued by a society prior to its reorganization under that act. (*Moore v. Guaranty Fund Life Soc.*, 178 Ill. 202; *Voight v. Kersten*, 164 Ill. 314.)

No change in the plan was necessary to create the emergency fund provided for in section 8 of the act referred to, because the evidence shows that when the change was made in 1890, appellant already had accumulated a surplus fund of \$428,039.34, and in the spring of 1898, when assessment No. 149 was levied, the testimony of appellant's secretary shows that such surplus had reached the sum of \$626,131.81. It is claimed that the change in plan and the increased assessments were necessary to avoid bankruptcy, and a showing is made that the contributions or assessments collected from the members in the old groups formed on the original plan, fell far short of paying the death losses occurring in such old groups; but this is not strange, if these groups are to be considered by themselves, and without reference to the newer membership, because, as we understand it, the whole theory of this kind of insurance is, that the fund will be fed and kept alive by new blood coming into the society, and not that the members furnishing the new blood will be set off into a separate class by themselves, and considered as a distinct group, having no relation to the older members of the society.

The examination made by the actuaries and insurance commissioners of different States, which were put in evi-

time subsequent to the changes of policy made in 1890, and appear to have relation to the manner of carrying on business under the new plan, and we think were immaterial and incompetent in this case. They were statements and opinions apparently procured at the instance and solicitation of appellant, in the absence of appellee, not under the sanction of an oath, without any opportunity for cross-examination, and it would seem to require no citation of authority to show that their admission was improper and erroneous. (*Bagley v. Grand Lodge of A. O. U. W.*, 131 Ill. 498.) The only purpose of appellant in introducing this class of proofs, as we take it, was to show that the society could not carry out its original contract with Tuttle without loss to itself and possible insolvency. We have already shown that in our opinion this was not a sufficient reason for refusing to perform the contract as nearly as it was possible for it to do so.

But it is further insisted by appellant, that because the certificate holder, Tuttle, from 1890 to 1898 paid the assessments levied against his certificate, which assessments were not in accordance with the original contract, but a clear departure therefrom, that the beneficiary, appellee, is now estopped from denying the right of appellant to assess the assured upon any other than the original basis, and from holding the company liable when Tuttle elected not to pay assessment No. 149. Conceding that in a proper case the doctrine of estoppel can be applied in actions at law, it becomes important to know what Tuttle did which warrants appellant in now invoking the doctrine against appellee.

It is true that in 1890 assessments were levied, not only to pay death losses, but to create a permanent fund, and Tuttle paid the assessments.

In 1895 another change was made in the manner of assessing. The group plan was abolished, and each member was assessed according to the estimated cost of his insurance at the time he entered the society, and he was also assessed not only to pay death losses, but also for the purpose of creating a permanent fund. Rather than take the



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possible chances of having his certificate forfeited and losing his insurance, Tuttle paid these assessments. Now this is the extent of his supposed wrong doing, upon which is predicated the right of invoking the doctrine of estoppel against appellee. Can it be, that because appellant violated its contract on former occasions by making illegal assessments, and Tuttle did not take the chance of having his certificate forfeited by refusing to pay them, that he or his beneficiary is estopped from denying the legality of assessment No. 149, which was for an amount so largely in excess of any previous assessment? We think not. He might have been content to pay a small increase on his original contract rate, and because he did so, shall it be said he was therefore bound to pay an amount ten times as great? We think to so hold would be unreasonable, and would be permitting the wrong-doer to invoke the doctrine of estoppel against the party injured. This, we think, ought not to be done. The doctrine of estoppel, when properly applied, is founded upon the highest principles of morality, and recommends itself to the common sense and justice of every one. Herman on Estoppel, p. 291, Sec. 272. Equitable estoppels, or estoppels *in pais*, only arise when the conduct of the party estopped is fraudulent in its purpose or unjust in its results. (Herman, p. 335, Sec. 321.) Or, as the rule is otherwise stated:

“Where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.” (Bigelow on Estoppel, pp. 433-434.)

It certainly can not be said that Tuttle, in paying previous illegal assessments, acted fraudulently, or that he willfully did anything calculated to mislead others to their injury. When he paid illegal assessments, he did so under a moral compulsion, and the threat, implied at least, that if he did not pay, his certificate would be forfeited, and the provision made for his wife in the event of his death be thereby lost. Did this conduct on his part warrant appel-

lant in increasing Tuttle's assessments tenfold? In other words, can appellant thus be permitted to take advantage of its own wrong? Would this commend itself to the common sense and justice of every one, or be in accordance with the highest principles of morality, upon which the doctrine of estoppel is said to have its foundation? We certainly think not. In a recent case decided in the Appellate Court of the Third District, against appellant (*Rowell v. Covenant Mutual Life Association*, opinion by Justice Wright, filed September 20, 1899), in discussing the same point, it is said:

"The suggestion that defendant was acting merely as the trustee of 26,000 other policy holders, puts them in no different attitude, for the actions of the association as trustees, were but the acts of the other members by their agent, and whatever a person does by his agent, he does by himself."

We concur in this view. But we think the Supreme Court of this State has substantially settled the question, in *Farmers' Fire Ins. Co. v. Knight*, 162 Ill. 470, which was a suit by Knight against the insurance company, to recover for a loss by fire, the defense being that by reason of his failure to pay an assessment levied against his policy, it had become suspended or forfeited and the company was not liable. He set up the illegality of the assessment, and the company invoked the doctrine of estoppel on the ground he had previously, on several occasions acquiesced in such illegal assessments by paying them. The point is thus disposed of in the opinion by Craig, J.:

"The evidence introduced on the trial, tends to prove that the managers of the insurance company, for several years, in making assessments, did not adhere to the statute, and that in a number of cases more money was raised than was at the time required to meet losses. But these violations of the statute did not ripen into a right; nor are we aware of any principle which would preclude a policy holder of the insurance company from calling in question the validity of an assessment, although he may have previously paid assessments which did not conform to the law. We do not think the doctrine of estoppel applies to such a case."

It seems to us, this language can with equal propriety be

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applied in the case at bar, and is conclusive of the question under discussion.

Counsel for appellant attempt to draw a distinction between the Knight case and the one before us, but we are of the opinion the argument in support thereof is more ingenious than sound, and does not do away with the force of the decision.

Cases have been cited from other States which seem to support a contrary view to that expressed in the Knight case, but we are bound by the decisions of our own Supreme Court, regardless of what other courts may have decided.

The action of the court upon propositions of law submitted was in accordance with the views herein expressed, and we think there was no error therein.

We are of the opinion the judgment was right and must be affirmed.

Judgment affirmed.

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**Magdalena Dorfner v. Louis Waldorf.**

1. **EQUITABLE LIENS**—*Of a Widow After Releasing Her Dower and Homestead.*—A widow released her rights of homestead and dower for the purpose of mortgaging lands to a person for funds to assist an insolvent daughter in paying her debts and enabling her to continue in business. The object for which the mortgage was given failed, and the funds to be obtained remained in the hands of the mortgagee; the lands passed into the hands of the daughter's assignee and were sold by him, subject to the mortgage and diminished by its amount, as assets for the payment of the daughter's debts. *It was held* that the widow was entitled to all the benefit of the funds remaining in the hands of the mortgagee which could equitably be given her.

**Appeal from the County Court of LaSalle County; the Hon. H. W. JOHNSON, Judge, presiding.** Heard in this court at the October term, 1899. Reversed and remanded with directions. Opinion filed February 1, 1900.

FRED T. BEERS, attorney for appellant.

LINCOLN & STEAD, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

On January 4, 1898, Magdalena Eck, a daughter of appellant, Magdalena Dorfner, was the proprietor of a general store for the sale of merchandise at Troy Grove, Illinois.

She was indebted to a considerable amount and, being pressed for payment by several of her creditors, on that date executed to Louis Waldorf, the vice-president of the Mendota National Bank, to which institution she was indebted, her mortgage for \$2,000 upon certain real estate which she owned, for the purpose of procuring money to pay the amount she owed said bank and certain other urgent indebtedness. In this mortgage appellant, who had a homestead and dower interest in said real estate, joined for the purpose of assisting her daughter in raising the money. While the mortgage was executed to Waldorf, the money was to have been really furnished by the bank, and after the execution of the mortgage, Crawford, the president of the bank, guaranteed the payment of certain amounts she owed to John A. Lamberton and the First National Bank of Mendota, and these debts have since been paid by his bank. The mortgage was mailed for record by the attorney for the bank that night or early next morning, and was entered of record January 5, 1898, at 1:30 P. M. On the day the mortgage was recorded, Deane Bros. & Lincoln, wholesale merchants, to whom Mrs. Eck was indebted, obtained two judgments against her in the Circuit Court of LaSalle County, one for \$220 and the other for \$385.70, on which judgments executions were issued to the sheriff and indorsed by him as received January 5, 1898, at 2:10 P. M. On the next day, January 6th, Mrs. Eck applied to the Mendota National Bank for her money, but, it having been discovered that a judgment had been entered against her on the day previous, Crawford, who was acting for the bank, refused to give it to her. The next day, however, Crawford, the president, and Waldorf, the vice-president of the Mendota National Bank, called on Mrs. Eck at her home in Troy Grove, and for some reason Waldorf then gave her a check for the \$2,000, and she delivered it to Crawford. It does not clearly

appear why the check was turned over to Crawford, though the latter claims it was done for the purpose of protecting Mrs. Eck from other creditors.

It also appears from the testimony of the two bank officers that they told Mrs. Eck they would hold the mortgage until all claims were settled, and as soon as they got their money back they would release the mortgage. As a matter of fact no money was ever paid her in person upon the check. On January 6, 1898, John Ferguson obtained a judgment in the County Court against Mrs. Eck for the sum of \$543.28, and afterward on the same day the Mendota National Bank recovered two judgments against her in the same court, amounting to \$1,017.70. Later, on the same day, appellant also recovered a judgment against Mrs. Eck in the Circuit Court for the sum of \$1,601.57. Upon all of these judgments executions were issued and received by the sheriff in the order in which they were rendered.

On January 7, 1898, the sheriff levied the executions then in his hands upon the chattel property of Mrs. Eck and took possession of her store at Troy Grove. The next day, January 8th, John A. Lamberton recovered a judgment in the Circuit Court against Mrs. Eck for the sum of \$117.19, upon which execution was issued and indorsed by the sheriff as received by him at 9:10 A. M., and on the same day the First National Bank of Mendota recovered a judgment in the same court against her for the sum of \$176.98, upon which execution was also issued to the sheriff and indorsed by him as received at 9:20 A. M. On January 10, 1898, Magdalena Eck made an assignment of all her property for the benefit of her creditors to Fred J. Engleman, who duly qualified as assignee and is still so acting. On January 17, 1898, all the execution creditors above named filed an agreement in the County Court, whereby they consented to an order directing the sheriff to turn over to the assignee all of the goods and chattels levied on by him by virtue of said executions, subject, however, to the liens of said executions, and the exemptions of said Magdalena Eck, on condition that the moneys arising from the sale of the same should be first

applied toward the payment of said executions, according to the priorities of their respective liens. Accordingly the County Court entered an order fixing the priorities of said execution creditors in the order in which their judgments were obtained, as above set forth, and directing that the property levied upon be turned over to the assignee. It also directed the assignee to sell the property, pay the costs of sale and bring the remainder of the money into court. The stock has since been sold by the assignee and he has \$2,369.07 derived therefrom, on hand, subject to the order of the court. The land mortgaged was inventoried and sold by the assignee for \$300, subject to the \$2,000 lien, and he has never received anything on account of said mortgage. On May 11, 1899, appellant filed her petition in the County Court alleging that said agreement was entered into without her knowledge or consent, and that no one had authority to attach her name thereto; that by reason of her judgment and execution she has a prior lien upon the personal property of Mrs. Eck; that she has never consented to the surrender to the assignee of the goods and chattels of Mrs. Eck levied upon by the sheriff; that the surrender of the same was a wrong and fraud upon her rights; that she has an equitable and legal lien against the money in the hands of the assignee derived from the sale of said goods to the amount of her judgment, interest and costs, and praying that her legal rights and priority might be determined.

Appellant further states in her petition the existence of the mortgage of \$2,000; charges that Waldorf paid said sum to Mrs. Eck and placed it to her credit as her money in the Mendota National Bank; that the bank officers conspiring for their own benefit and to the wrong and injury of Mrs. Eck and her creditors, have refused to pay out said money to Mrs. Eck, that she might turn the same over to her assignee; that the assignee has long known that said bank had \$2,000 belonging to Mrs. Eck, but that he conspired with the bank and Gardner, his attorney, who was also attorney for many of the judgment creditors, to withhold said sum from the estate of Mrs. Eck; that by reason of her

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diligence and discovery, appellant is entitled to be paid her judgment and interest out of said \$2,000 as a preferred creditor over all other creditors of said insolvent. She therefore prays that said assignee may be removed and a new one appointed, with directions to collect the \$2,000, and out of the same satisfy appellant's judgment. The petition also contains a prayer that the court will cause the matters and things therein complained of, to be examined into and determined, and that the rights and interests of all the parties therein referred to, may be fully discovered and determined according to their lawful and equitable rights, priorities and standing, and that she may be granted such other and further relief in the premises as the law may direct and equity shall demand, etc.

The court, upon the hearing, denied the prayer of the petition and ordered the same dismissed at appellant's cost. Appellant excepted and appealed to this court.

We hold in this case, first, that the prayer of that part of the petition which seeks, in effect, to set aside the agreement between the creditors to take the assets from the hands of the sheriff, and deliver them to the assignee to sell and satisfy the judgments in the order of their priority, should be denied. The reason given by appellant why the agreement should be set aside, is that the attorney, Gardner, who signed the same for her, had no authority to do so. He was, however, her attorney of record in the procurement of the judgment upon which the execution was issued, and she is still claiming the advantage of that judgment which he obtained for her, while denying his right to represent her in signing the agreement with the other creditors. The agreement did not disturb the priorities of the several judgment creditors as they existed at law, nor affect their rights as to each other in any respect. It simply provided that the assignee should make the sale and distribute the proceeds, instead of the sheriff. In signing the agreement, Gardner only exercised his discretion as to the best manner of collecting the debt, and for that purpose he had implied authority, under the circumstances of the case, to act for appellant.

The proof does not show that appellant's interests were injured in the least by the agreement, and there is no reason why the same should be set aside. It also follows from what has been above said, that no reason appears from the proofs why appellant's claim should be made a prior lien over that of the other creditors, on the assets now in the hands of the assignee.

Second. As to the mortgage for \$2,000 given by Mrs. Eck and appellant to Waldorf for the Mendota National Bank, we think appellant is entitled to some relief. She had homestead and dower in the mortgaged premises which she released for the purpose of assisting her daughter in obtaining money to pay debts and continue in business. The money was not obtained, the object for which the mortgage was given, failed, and the daughter did not get the expected relief. The real estate having been sold subject to the mortgage indebtedness, the assets in the hands of the assignee for the creditors were thereby diminished to that extent. Appellant is therefore entitled to all the benefit of the fund held by the bank, which can equitably be given her.

The bank claims to hold the fund as security for the indebtedness due it on its judgment and also for the amounts paid by it for Mrs. Eck to the First National Bank of Mendota and Lamberton. It is inequitable that the bank should retain both the mortgage and the \$2,000 it was given to secure, and which is more than sufficient to pay all its indebtedness, and also have a share in the assets in the hands of the assignee. Crawford, the president of the bank, took the check from Mrs. Eck, and the fact that the transaction was intended to deceive some one else, does not relieve the bank from responsibility. The transaction was conducted for the benefit of the bank by its officers and we must treat it as, in effect, a deposit of \$2,000 in the bank for Mrs. Eck. Under the agreement between Mrs. Eck and the bank officials, however, we think the bank should be permitted to retain out of the funds a sufficient amount to pay its judgment against her and also the judgments in favor of the First National Bank and Lamberton, which it guaranteed and paid, but without interest from the time the



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mortgage was given to Waldorf. The portion of the fund remaining after the payment of these debts belongs to the assignee of Mrs. Eck for the benefit of her creditors, the title having passed to him by the act of assignment. Appellant's execution is fourth in the order of precedence recognized by the County Court under the agreement above referred to, and when the assignee shall have collected the balance due him from the Mendota National Bank, as above indicated, there should be sufficient funds in his hands, with what he has already received, to pay her debt, together with those which have priority over hers in full.

The order of the County Court, in dismissing appellant's petition, is reversed and the cause remanded, with directions to that court to enter an order in conformity with the views of this court as above expressed. Reversed and remanded with directions.

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**Wellington W. Aurand v. David L. Martin et al.**

1. **MECHANICS' LIENS**—*Laws to be Strictly Construed.*—Mechanics' lien laws are in derogation of the common law and must be strictly construed.

2. **SAME**—*Sufficient Statement of a Lien.*—Where a person filed a claim, stating that he claimed a lien for the sum of \$1,818 on the three lots situated in different parts of the city (describing them) for work done and material furnished in and about the construction of three dwelling-houses thereon, etc., but without showing what buildings had been constructed upon each lot, or the amount of the indebtedness apportioned among the lots, *it was held* that the statement was not sufficient.

**Mechanics' Liens.**—Appeal from the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSEY, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed February 1, 1900.

RENNER & SMITH, attorneys for appellant.

A. A. WOLFERSPERGER and F. E. ANDREWS, attorneys for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a bill to enforce a mechanic's lien, by appellant, against three lots in the city of Sterling, two of which were adjoining in the west end of the city, and the other in the east end, some sixteen to twenty blocks distant. On May 22, 1896, appellant entered into a verbal contract with Douglas L. Maxwell to construct three dwelling houses of the same description and with the same outbuildings upon said lots, for the sum of \$1,818.

It appears that at the time of making the contract for the buildings, Maxwell had a deed to one of the lots and contracts for deeds to the other lots but that prior to the commencement of this suit he had parted with all title and interest thereto. On October 16, 1896, appellant filed his claim of lien, verified by his affidavit, with the clerk of the Circuit Court, in which he stated that he claimed a lien for the sum of \$1,818 on the three lots, describing them, for work done and material furnished in and about the building and construction of three dwelling-houses and outbuildings thereon, in furtherance of said contract entered into by him with said Maxwell; that work was commenced within thirty days and completed on August 15, 1896, at which time the contract price was due and payable; that there was then due and unpaid on said contract the sum of \$1,818. Said claim of lien did not show what buildings had been constructed upon each lot and the amount of the indebtedness was not apportioned among the lots, but was stated in one entire sum. The court below found that the equities of the case were with the appellees, denied the claim for a lien asked by appellant and dismissed the bill.

It was charged in the bill and there was some evidence introduced for the purpose of showing that certain of appellees knew of the contract between appellant and said Maxwell, and connived together to cheat, swindle and defraud appellant and prevent him from collecting and enforcing his claim for lien. The charge of fraud, however, was not sustained by a preponderance of the evidence, and for the purposes of this suit, the appellees, who own the lots in

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question, must be treated as innocent purchasers without actual notice of appellant's claim. The question then arises whether appellant could secure a lien by filing a claim for a single amount against the three lots, one of which was situated in a distant part of the city from the others. Under the mechanics' lien law as it existed prior to 1895, it was repeatedly held that the lien given to mechanics or material men was purely statutory, and that one who failed to substantially comply with its terms and provisions, could not take advantage of it. *Buckley v. Commercial National Bank*, 171 Ill. 284. The law as it then stood provided that the person furnishing the labor or materials, etc., in building, altering, repairing or ornamenting any house, should have a lien upon the whole of the tract of land upon which such house or building and appurtenances stood, for the amount due him for such labor, material or services. *Hurd's Stat.*, 1893, Chap. 82, Sec. 1.

In *Buckley v. Commercial National Bank*, *supra*, in construing that law it was said, in speaking of a lien for a single amount for labor and material furnished for seven houses erected upon as many adjoining sub-lots, that "each of these houses and lots being a separate and distinct piece of property, and the law being that appellants could only enforce a lien against each for the work and material furnished on it, it would seem to follow that a reasonable compliance with the foregoing sections of the statute required appellants to in some way indicate in their statement the amount which they claimed against each. Manifestly the purpose of requiring the statement to be filed is that third persons dealing with the property shall have notice of the amount, nature and character of the lien as well as the times when the material was furnished or labor performed and thus enable them to know from the claim itself that it is such as can be enforced."

Section 1 of the revision of the mechanic's lien law of 1895 provides that any person furnishing labor or material, etc., for improving a lot, shall be known as a contractor, "and shall have a lien upon the whole of such tract of land

or lot and upon the adjoining or adjacent lots of such owner constituting the same premises and occupied or used in connection with such lot as a place of residence or business; and in case the contract be entire and relate to two or more buildings on adjoining or adjacent lots of the same owner, upon all of said lots and the improvements thereon, for the amount due to him for such material, fixtures, apparatus, machinery, services or labor."

Section 7 provides for the filing of the claim for a lien duly verified within four months after the last payment upon the contract shall have become due and payable, with the clerk of the Circuit Court of the county in which the premises are situated, "which shall consist of a brief statement of the contract, the date the same was made, the date fixed therein or the time implied for completion and for final payment, and the date that the same was completed, if completed, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tract of land to pass the title thereof by deed of conveyance."

Section 17 provides that "where the contract for material or labor is entire and relates to houses on different lots, the court shall apportion the amount of the lien and costs on each house and lot according to the value thereof and direct the sale of each house and lot separately to satisfy the amount of the lien and costs apportioned against it, and if the same shall not sell for sufficient to pay such amount shall order the deficiency paid out of the surplus proceeds of the sale of any other of said houses and lots covered by such lien."

Under this law, then, where the contract is entire and two or more buildings are built on adjoining or adjacent lots of the same owner, the contractor has a lien for the whole amount due him upon all of said lots, and in such case the court must apportion the amount of the lien and costs on each house and lot according to the value. Sections 1 and 17, when construed together, evidently provide for the apportionment of the amount of the lien and costs only in cases where the different lots on which the several houses are erected are adjoining or adjacent.

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We find nothing in the statute as it now exists, authorizing a contractor to file a single lien for the whole amount due him for labor and material furnished in the erection of houses located on lots which are not adjoining or adjacent to one another. As appellant has failed to substantially comply with the terms and provisions of the statute in filing his claim for a lien against the lots in question, the same can not be enforced. He could no doubt easily have apportioned the amount claimed to be due to him for the buildings erected upon the several lots, placing, if he so desired, the amount of the lien claimed upon the two adjoining lots in one amount, but having failed to do so, he can not now justly complain.

The decree of the Circuit Court denying appellant's claim for a lien and dismissing his bill was proper, and is accordingly affirmed.

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**Leonora M. Nott, Impleaded, etc., v. Peter Shutts, Adm., etc.**

1. **FRAUDULENT CONVEYANCES—*Measure of Proof.***—In order to impeach a conveyance as fraudulent and made for the purpose of defrauding creditors, the proof must be ample, as fraud will not be presumed.

**Bill to Set Aside a Conveyance.**—Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.

C. W. BROWN, attorney for appellant.

J. R. FLANDERS and P. SHUTTS, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a bill in chancery, filed in the Circuit Court of Will County March 24, 1897, by James P. Hemphill against Leonora M. Nott, the appellant, Seraphina Little and Thomas Little.

The allegations of the bill are in substance, that on November 6, 1896, James P. Hemphill obtained judgment in said Circuit Court against Thomas and Seraphina Little for \$1,460 and costs, upon which execution issued and was returned wholly unsatisfied; that said Thomas and Seraphina Little are husband and wife, residing on certain premises in the city of Wilmington, upon which they have resided for about fifteen years last past, and that the same are reasonably worth \$3,000; that about fifteen years ago said Seraphina Little negotiated for the purchase of said premises from Daniel Small; that the judgment obtained by Hemphill was for the sum of \$1,000, loaned to Thomas and Seraphina Little in 1884, to enable Seraphina Little to make a payment upon the purchase price of said real estate; that said Small died before Seraphina Little obtained a deed from him for said premises, leaving a widow and five children; that in order to complete the purchase it became necessary to obtain conveyances from his widow and children; that by deed of December 9, 1891, Seraphina Little obtained the interest of the widow and one child; that the deeds conveying the interests of the other children were not made until after judgment was obtained by said Hemphill against said Thomas and Seraphina Little as aforesaid; that in order to defraud said Hemphill and prevent him from collecting said judgment said Seraphina Little caused the deeds from the said remaining children of Daniel Small to be made to the appellant, Leonora M. Nott, her sister, and also caused the executor of the estate of Daniel Small to make a deed of said premises to appellant; that said deeds to appellant were made in furtherance of an understanding and design between Seraphina Little and appellant to defraud Hemphill and prevent him from collecting his judgment out of said real estate; that all the moneys for the purchase of said real estate were in fact advanced by Seraphina Little, who was the true owner of said real estate and that if any part of the purchase price was paid by appellant, such part was paid for the use of said Seraphina Little in accordance with the understanding and design between them, to

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defraud Hemphill; that appellant holds title under said deeds for Seraphina Little, for the purpose of preventing satisfaction of said judgment out of said premises, and that such conveyances to appellant, as against said Hemphill, are fraudulent; that said Thomas and Seraphina Little had at no time since the rendition of said judgment, any property or effects from which to make the amount thereof. The prayer of the bill was that the deeds to said appellant be decreed to be fraudulent, as against said Hemphill, and the title to said real estate be decreed to be in said Seraphina Little; that the clerk of said court be directed to issue another execution on said judgment and the sheriff directed to levy upon said premises and sell the same as the property of Seraphina Little, for the payment of appellee's judgment. A joint and several answer was filed by Thomas and Seraphina Little and appellant, denying that said deeds were made to appellant in furtherance of any design between the latter and said Thomas and Seraphina Little to defraud said Hemphill or prevent him from collecting his judgment, and alleging that appellant purchased the undivided four-fifths of said premises in good faith with her own individual means, without any intention of defrauding said Hemphill or any other person or persons whatsoever, and that she holds the same for her own use and benefit and as her own individual property.

Before the trial of the cause James P. Hemphill died, and his death having been suggested, Peter Shutts, the administrator of his estate, was, by order of court, substituted as complainant. Upon the trial the court found in favor of appellee; decreed that said conveyances to appellant were fraudulent and void as against appellee; that Seraphina Little was the owner of all interest acquired in said premises by the deeds to appellant; that the Hemphill judgment was a lien upon said real estate subject to the right of homestead, and ordered that execution issue upon the same and belevied upon said real estate. An appeal to this court was prayed and perfected by said Leonora M. Nott.

The only witness introduced by appellee upon the trial of the cause to prove the allegations in the bill, except as to

the value of the property, were appellant and said Seraphina Little. From their testimony it appeared that about 1884, Thomas and Seraphina Little negotiated with Daniel Small for the purchase of the premises described in the bill for \$2,000; that a written contract was entered into between Thomas Little and Daniel Small concerning the matter but that the same has since been either destroyed or lost; that about the time of the purchase they paid \$500 on the place, which was part of the money borrowed by them from Hemphill; that no further payment on said premises was ever made by Thomas and Seraphina Little directly, although they have continued to occupy the same to the time this suit was brought; that prior to December 9, 1891, Daniel Small died, and on said last mentioned date a deed to one-fifth of the premises, together with the interest of the widow, was made to Seraphina Little on account of services rendered by her to the widow; that in May, 1896, the widow, who had been an invalid for several years, died, leaving a legacy of \$2,000 to Seraphina Little, who had cared for her in many ways, since Mr. Small's death, without compensation; that the legacy was 'paid to Mrs. Little in July, 1896, and she, about the same time, turned over \$1,000 of it to appellant, who deposited the same in a bank until some time in the following November, when she paid the same to certain heirs of Daniel Small for the four-fifths interest in said premises, conveyed to her by them; that appellant, who was a teacher in the public schools at Wilmington, has resided with the Littles since 1884 on the premises in question; that up to the year 1889, she paid board; that she then commenced to pay the expenses of the family, consisting of Mr. and Mrs. Little and herself, and continued to pay them until 1893, when for two years she again paid board, and Mr. Little resumed the payment of the family expenses; that she afterward ceased to pay board and resumed the payment of the family expenses, including doctor's bills, clothing for Mrs. Little and taxes; that said sum of \$1,000 was paid to appellant by her sister to reimburse her for what she had paid on the family expenses.

The only question of importance raised by appellant is



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Nott v. Shutts.

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whether the evidence was sufficient to sustain the decree. There was no proof that the original contract in writing for the purchase of the premises was made with Mrs. Little or that the payment of the \$1,000 by appellant was made under such contract. Mrs. Little swore that the contract was probably destroyed and that she supposed it was annulled or canceled years ago, when it was found they could not pay for the place.

The evidence failed to show any agreement between Mrs. Little and appellant that the conveyances in question should be taken to the latter for the purpose of defrauding appellee. On the contrary, appellant and her sister swore positively that there was no such agreement between them, but that the payment of the \$1,000 was honestly made by Mrs. Little to appellant for the purpose of repaying to the latter what was justly due her. Appellant had for years supported her sister and her husband and paid the taxes on the premises in question, and it does not appear that the \$1,000 paid her was more than was rightfully due her. The money was paid to appellant in July, prior to the time Hemphill obtained his judgment against Thomas and Seraphina Little, and kept by her in a bank for some four months before she purchased an interest in the premises in question. There was no reason arising out of the circumstances of this case which would preclude Mrs. Little from repaying appellant the money so advanced by her. Appellant having received the money as her own in good faith, was at liberty to invest it as she saw fit, and the mere fact that she chose to purchase an interest in the premises occupied by her sister and husband is not of itself sufficient to raise a presumption of fraud.

We are of opinion that appellee failed to sustain his bill and the decree in this case will therefore be reversed and the cause remanded, with directions to the court below to dismiss the bill. Reversed and remanded with directions.

Mr. Justice DIBELL took no part in the decision of this case.

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**Chicago, R. I. & P. Ry. Co. v. Pearl Keely, Adm'x, etc.**

1. **INSTRUCTIONS**—*Death from Negligent Act.*—An instruction in an action to recover damages resulting from a death from negligence, which has a tendency to mislead the jury into believing that notwithstanding the fact that the deceased may have been guilty of negligence in bringing about the accident, yet if the speed of the train or neglect to ring the bell contributed to cause the injury the plaintiff was entitled to recover, is erroneous.

**Action in Case.**—Death from negligence. Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 1, 1900.

HENRY CURTIS and JACKSON & HURST, attorneys for appellant.

WOOD & PEEK, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit by appellee for damages claimed by her on account of the loss of her husband, Henry Keely, who was alleged to have been killed by a train of appellant at a street crossing in Moline, Illinois, on September 25, 1897.

The declaration, which consisted of four counts, charged that the deceased, Henry Keely, while exercising due care in his own behalf, and while attempting to cross the railroad tracks of appellant on Thirteenth street, in the city of Moline, was struck and killed by a certain train of the defendant, "not a passenger train." It is also charged in the several counts that the train was running at a greater rate of speed than provided by the city ordinances of Moline; that it was running at a dangerous rate of speed; that the engineer and fireman did not keep proper look-out while crossing the highway; that no bell was rung or whistle blown, as provided by statute; that no bell was rung and kept constantly ringing, as provided by the ordinances of said city; that no warning was given of the

approach of the train, and that there was no head-light upon the engine. Defendant pleaded the general issue. There was a trial by jury, which resulted in a verdict in favor of appellee for \$5,000. Judgment was rendered upon the verdict, and appellant appealed from the same to this court.

At the time in question, Henry Keely worked in Moline, but his family lived at Port Byron, some fourteen miles distant. Thirteenth street, where the accident is alleged to have occurred, runs north and south. Parallel with it 320 feet to the west is Twelfth street. Appellant's railroad crosses these streets from the northwest to the southeast, the railroad station being located on the south side of the track, just east of Thirteenth street. Appellant had three tracks, the south one being used for trains going east, the one just north of it for the west bound trains, and the next one to the north for switching and extra work.

The Chicago, Milwaukee & St. Paul Railroad used appellant's depot and tracks in the city of Moline, and also used the tracks as far east as Port Byron Junction. Some fifty feet north of appellant's tracks is the track of the Chicago, Burlington & Quincy Railroad, and just north of the latter's right of way, about mid-way between Twelfth and Thirteenth streets, was the house of Henry Reece, with whom Keely boarded when in Moline. This house was about 450 feet northwest from appellant's depot. About half past six o'clock on the evening of the day mentioned, Henry Keely left his boarding-house to go to appellant's depot for the purpose, as he said, of buying a ticket for passage on the Chicago, Milwaukee & St. Paul Railroad to Port Byron. As Keely came from the house he met witnesses Walstencroft and Charles Reece. At that time the freight train, which is alleged to have caused his death, was approaching Twelfth street from the west. Reece spoke to Keely and said, "That isn't your train," to which the latter replied, "I know, but I want to go to the depot before the other train comes in, the next train, and get a ticket." Reece further testified that Keely went straight south

to the Rock Island road, then turned to the left toward Thirteenth street; that he went close to the track and disappeared behind a shed, which stood north of appellant's tracks near the place where he turned.

This was the only positive evidence upon the subject, as Walstencroft said he did not look after Keely and was not certain as to the course he took. It therefore appears that the last seen of Keely prior to the accident, he was close to appellant's tracks between Twelfth and Thirteenth streets going east. He was shortly afterward discovered lying dead just north of the south track of appellant a short distance east of the west line of Thirteenth street. No one saw him on Thirteenth street prior to the time the engine crossed the same. Only two witnesses profess to have seen him after he was lost sight of by Reece and before he was found lying by the side of the track.

The witness Nystrom, who was at the time a boy of twelve years of age, testified that he and another boy were standing on the north side of the track waiting for the train, which consisted of forty-four cars, to go by; that the locomotive had passed the crossing before he reached there, and when all but six or seven cars had passed he looked to the west to see how near the caboose was, and at that instant saw what appeared to him to be a bundle, rolling on the ground as though it had fallen from the train; that when he first saw it, it was on or near the edge of the sidewalk, and that it rolled from there to the place where it was found; that after the train had passed he went to it and discovered it was the body of a man.

The witness Lagerlef testified that he was going south on Thirteenth street, and that when he got as far as the C. B. & Q. tracks, he noticed something "careering" upon the track of appellant, over which the train had just passed, and that he afterward went up to the track and found the body of a man.

We think it appears from the preponderance of the evidence that the engineer was in his place, keeping a proper look-out while crossing the street, and that he did not see

the deceased; that the headlight on the engine was lighted and that the proper signals were given; that the gates with which the crossing was provided, were let down by the gate-keeper, and that the latter rang his bell to signal the approach of the train. There was evidence tending to show, however, that the train was going at a higher rate of speed than was permitted by the ordinance of the city. It was sought to be shown by appellee that deceased was struck by the engine on the crossing, but that was impossible from appellee's own evidence in the case. Indeed, it is very doubtful from the evidence whether he was struck on the crossing at all. As he was first seen by the witness Nystrom near the end of the train, rolling like a bundle from the sidewalk toward the east, and the body was found near the east side of the sidewalk, it is highly probable that he first came in contact with the train at some point west of Thirteenth street, near the place he was last seen. Whether deceased received his injuries in an attempt to get on the train as argued by appellant, or was caught by the cars in some other way, does not appear. It does sufficiently appear, however, that he was not struck on the crossing, and was not struck by the engine or head of the train, and under these circumstances, we can not say that he was, at the time, in the exercise of ordinary care for his own safety.

Upon the trial, appellant offered an instruction telling the jury that, although they might believe from the evidence that the train at the time of the accident was running over the Thirteenth street crossing at a greater rate of speed than six miles an hour, or that the bell was not rung at the time, yet if they further believed from the evidence that the speed of the train or the neglect to ring the bell was not the direct or immediate cause of the injury to Keely, then the jury could not find defendant guilty of the alleged negligence in running the train at a greater rate of speed than six miles an hour or for negligence in not ringing the engine bell. This instruction was modified by the court striking out the words "direct or immediate" and inserting others, so that the instruction told the jury that

if they believed that the speed of the train or neglect to ring the bell was not the cause, in whole or in part, of the injury to Keely, then the jury should not find the defendant guilty on the ground of the alleged negligence in running the train, etc. While the modification of this instruction would not of itself furnish a sufficient cause for reversal, yet we think it was in a measure improper. The instruction as originally offered was not erroneous, although the words "direct or proximate" would have been better than "direct or immediate" in referring to the cause of the injury. The words "in whole or in part," however, inserted by the court, may have been misleading to the jury, as it might have been thought from the instruction that notwithstanding the fact that the deceased may have been guilty of negligence in bringing about the accident, yet if the speed of the train or neglect to ring the bell contributed to cause the injury, the appellee was entitled to recover.

The judgment of the court below is accordingly reversed and the cause remanded for another trial. Reversed and remanded.

## CASES

IN THE

# APPELLATE COURTS OF ILLINOIS.

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THIRD DISTRICT—NOVEMBER TERM, 1899.

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**Birdsell Mfg. Co. v. William H. Oglevee, Thomas N. Leavitt and Ela Brown.**

1. **TORT—Effect of a Waiver.**—Where a person, with full knowledge of the facts, elects to waive a tort and sue in assumpsit, he can not afterward discontinue his action and sue in tort. Such election once made is final.

**Trover.**—Appeal from the Circuit Court of De Witt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

J. B. HUTCHINSON and MOORE, WARNER & LEMON, attorneys for appellant.

GEO. K. INGHAM, B. F. SHIPLEY and MILLS BROS., attorneys for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant sued appellees first in assumpsit and then by leave of the court changed the form of the action to trover and case, to recover against them for the alleged wrongful conversion of certain manufactured implements consigned to the Leavitt & Oglevee Co., a corporation of which appellees

were the officers and managers. The consignment was made to the consignee for it to sell the goods and to make remittances of the proceeds of such sales from time to time to the consignor. Certain sales of part of the goods, and remittances therefor were made, after which the Leavitt & Oglevee Co. traded the remainder of the goods, amounting to \$1,475.15, appellant's price, with other property of the latter company, for Missouri lands, it then being the purpose of the Leavitt & Oglevee Co. to close out and retire from business, the title of the lands having been taken for the use of the latter company. This transaction was reported to appellant in December, 1895, and to which it then made no objection. In July and August, 1895, the Leavitt & Oglevee Co. was garnisheed as creditors of appellant at the suit of Illinois Malleable Iron Co. and Independent Fire Sprinkler Co. for the respective sums of \$635.19 and \$414.50, and for which, by the consent of appellant, judgments were rendered against the Leavitt & Oglevee Co. after it had reported the trade of implements for Missouri land as above stated. After these judgments were so rendered they were by the court, on motion, set aside for the reason no judgments had previously been rendered against appellant for the respective sums due its creditors in the attachment suits in which the garnishment proceedings emanated, it then being supposed the judgments in garnishment were invalid for such reason; but later, and after judgments were obtained in the original suit, the judgments against the garnishees were renewed.

In this case a trial by the court, a jury having been waived, resulted in a finding and judgment against appellant in bar of its action and for costs, from which it appeals to this court, and to effect a reversal of such judgment has assigned and argued as error of the trial court the admission of improper evidence, the rulings of the court as to the law in the decision of the case, and especially that the finding of the trial court is not supported by the evidence.

We do not deem it necessary to discuss all the questions made by counsel by which the ruling of the trial court is



brought before us upon the admission of evidence. Inasmuch as the trial was by the court, no good purpose would be subserved in extending this opinion, if we find sufficient competent evidence in the record by which the finding of the trial judge may be supported.

The suit is in tort against appellees individually, they having been directors of the Leavitt & Oglevee Co. at the time of the exchange for the Missouri land, the corporation having subsequently become insolvent. The contention of appellant is that appellees, as directors of the corporation, wrongfully converted the property of appellant to their own use. It is replied to this that the contracts under which the Leavitt & Oglevee Co. accepted the goods of appellant are but contracts of sale and not of bailment, but we can not so construe them. It is next urged by appellees that appellant, by its silence, and failure to object after the exchange was reported to it, acquiesced therein, and by consenting to the entry of money judgments for the value of the goods at their own prices in the garnishee proceedings, and generally by their acts, ratified the transaction as a sale to the Leavitt & Oglevee Co., and thereby waived the alleged tort and accepted the Leavitt & Oglevee Co. as contract creditors, and having so ratified the sale and waived the tort it can not now be heard to say it will hold appellees liable in any form of action, and especially not in form *ex delicto*. Upon an examination of the evidence we feel warranted in the conclusion that the findings of the trial court upon these respective contentions are fully sustained and supported, and we are not inclined to disturb such finding. It seems clear to us that the correct conclusion to be drawn from all the evidence, and that the natural inference to be drawn from undisputed facts is, that appellant was satisfied to accept the Leavitt & Oglevee Co. as its creditor for the goods consigned to it, and that it did ratify the exchange of its property to Evans for the Missouri land, and that until the Leavitt & Oglevee Co. became insolvent, no objection or thought of objection was manifested by or in the mind of appellant to such exchange.

Appellant had already sufficient faith in the honesty and ability of the corporation to induce it to confide the care of and authority to sell its property by the Leavitt & Oglevee Co. and make remittance of the proceeds of sales, and it is not unreasonable to infer from the evidence in the case that such trust and confidence extended to a desire and willingness to sell the same property to that company, and that it did accept the relation of vendor and purchaser immediately the facts were reported. Having once voluntarily, with full knowledge of the facts, assumed the relation of vendor, as we think it did, and thereby waived the tort, if one there was, appellant is not now entitled to maintain this action against the appellees.

We find no reversible error in rulings of the court, in the admission of evidence, or in its holdings as to the law in the decision of the case, and the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

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**Mary A. Richardson v. John V. Richardson, Impleaded, etc., Executor, etc.**

1. *WILLS—Testamentary Intentions—When They Take Effect.*—Testamentary intentions take effect at the death of the testator, and the law as it then exists becomes as much a part of the will as if written into it.

2. *SAME—Fraudulent Dispositions of Property.*—A fraudulent disposition of property in a will can have no effect whatever, as no creditor can be prejudicially affected by the terms of a will. A creditor's rights are fixed and determined by law, and not controlled by the will of his debtor.

3. *ADMINISTRATION OF ESTATES—Rights of Creditors.*—A creditor's right to be paid out of the assets of his debtor's estate does not depend upon testamentary provisions, but is secured by law both in testate and intestate estates.

4. *SAME—How Administrators and Executors Take.*—Administrators and executors, so far as creditors are concerned, take the property of the deceased person in the same condition as it was left at the time of his or her decease, whether such condition is the result of the operation of law, or the act of the deceased party himself.

Richardson v. Richardson.

5. **EXECUTORS AND ADMINISTRATORS—*Personal Representatives of Deceased.***—An executor or administrator is the representative of the intestate or testator, and succeeds to his rights and interests. He is not the agent or trustee of creditors and as to the latter it can make no difference whether there be a will or not, for in either case creditors are entitled to prove their claims and participate in the distribution of the assets as the law directs.

6. **PARTIS—*Fraudulent Conveyances by Deceased Persons—Rights of Creditors.***—If fraudulent conveyances, or other fraudulent disposition of property by the deceased person should intervene to affect his rights prejudicially, the creditor alone, and not the representative, can invoke the remedy.

7. **REAL ESTATE—*Of Deceased Persons—Power of Administrator and Executor.***—The executor or administrator has no concern with the real estate; he is not entitled to receive the rents and profits, as they belong to the heirs or devisees; the only power of the executor or administrator with respect to the realty is to petition the court for leave to sell it for the payment of the debts of the deceased, and to make sale of it for such purpose upon license given, and the general rule in this respect is not varied by will.

8. **PERSONAL ESTATE—*Administrator the Sole Representative.***—The administrator is the sole representative of the personal estate, but not of the real property. The latter descends to and vests in the heirs, over which the administrator has no control or concern, except a mere power to apply for an order to sell the same, when necessary for the payment of debts.

9. **ADMINISTRATOR—*Takes no Realty, etc.***—An administrator takes neither an estate, title or interest in the realty of the deceased. He can not support a possessory or real action, in law or equity, for the recovery or maintenance of possession or title, or to clear a title from clouds or adverse claims; if necessary to sell for the payment of debts, he must take the estate as he finds it.

**Bill for Relief.**—Appeal from the Circuit Court of Morgan County; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

WILLIAM A. CRAWLEY and CYRUS EPLER, attorneys for appellant.

MORRISON, WORTHINGTON & REEVE, attorneys for appellees.

MR. PRESIDING JUDGE WRIGHT delivered the opinion of the court.

On January 16, 1896, Vincent S. Richardson made and

executed his last will and testament, and having afterward died, it was, June 20, 1896, duly admitted to probate in Morgan county, and appellees, who were nominated in the will, were duly appointed executors thereof, and thereafter they entered upon the discharge of their duties as such executors. Among other provisions in the will, it contained the following:

"I give and bequeath to my beloved wife, Mary Ann Richardson, the use and undisputed possession of all my homestead, farm and dwelling, and all improvements, household goods and all appurtenances thereto belonging; and all income from my real estate, rents or other income shall be paid to my beloved wife, Mary A. Richardson, to be hers to have and to hold and to use as she pleases. Said homestead is situated in Section 33, T. 15, R. 11, in the county of Morgan and State of Illinois, and it is my wish and desire that my executors, hereafter named, shall collect all rents or income from the above mentioned real estate, and all the rest of my real estate, be it situated in Morgan county or Scott county, Illinois, and pay the same to my beloved wife as long as she shall live."

And further:

"I desire that my executors, hereafter mentioned, shall look after all my real estate, pay all taxes and keep the same in reasonable and good tenantable repair, and shall rent the same to the best possible advantage, and all benefits or rents shall be paid to my wife when collected, discounting, however, costs of taxes and repairs."

Appellees collected rents of lands of the testator under the provisions of the will, and failing to pay the same to appellant she filed her bill in equity against them to enforce her rights thereto. The bill was answered by Richardson, appellee Ranson having defaulted, and the cause was referred to the master, who found there was due to appellant for rents collected, \$2,253.41, the same having accrued after death of the testator. The court, however, sustained appellees' exceptions to the report and dismissed the bill for want of equity, from which decree appellant has taken this appeal, and urges such action of the court as error, whereby she seeks a reversal of such decree.

In addition to the facts above stated, it also appeared on the hearing that a claim of \$5,036.70 of the seventh class, had been allowed in favor of Charles E. Goodrich against the estate of the testator, and subsequently to his death, appellant had, under foreclosure proceedings instituted by her, August 20, 1898, purchased the premises, from which the rents in question issued, for \$32,767.80, and held a certificate of purchase therefor. It also appears from the allegations of the bill that the mortgage so foreclosed was given to appellant by her husband in 1894, to secure her separate property then in hands of her husband.

Appellees, by their answer, set up the claim of Goodrich, and that the fund derived from the rents of the premises was required to pay the same, and this seems to have been the view of the chancellor who heard the cause.

Counsel for appellees concede there is no room to dispute the facts, but insist in support of the decree that it is not in the power of the testator to give away his property, and leave his debts unprovided for; the testator must be honest first, then generous if he may. And continuing, in their brief and argument, they say, "It is not denied that the cases cited and many others which might be found, are to the effect that an executor or administrator has nothing to do with real estate, and that rents belong to the heirs and not to the personal representative;" and then deny that such is the question here, contending that because the testator directed the executors to collect the rents and pay them to appellant, and such being received by them, whether as executors or trustees, were rightfully in their hands, and therefore payable to the creditors of the deceased.

Counsel by their contention seem to imply there is a fraudulent conveyance, or some fraudulent disposition of property included in the provisions of the will, that in a manner affects the creditors of the estate. We do not think such question involved, neither is it implied in any of the provisions of the will. Testamentary intentions take effect only at the death of the testator, and the law as it exists

becomes as much a part of such provisions as if written into them, and no one would contend that a fraudulent disposition of property contained in a will would have any effect whatever. No creditor can be prejudicially affected by the terms of a will. His rights are fixed and determined by the law, and not in any manner controlled by the will of his debtor. A creditor's right to be paid out of the assets of his debtor's estate does not depend upon testamentary provisions, but is secured by the law, and is the same and none other, both in testate and intestate estates. The law is so familiar in this State as to require no citation of authorities, that the administrator or executor, so far as creditors are concerned, takes the property of the deceased person precisely as it was left at the time of decease, whether such condition is the result of the operation of the law, or the act of the party himself. He is the representative of the intestate or testator, and succeeds to his rights and interests, and is not the agent or trustee of creditors, and as to the latter it can make no difference whether there be a will or not, for in either case he is entitled to prove his claim and participate in the distribution of the assets as the law directs. If fraudulent conveyances, or other fraudulent disposition of property by the deceased person should intervene to affect his rights prejudicially, the creditor alone and not the representative can invoke the remedy.

In a case like this, so far as the real estate is affected, and the power and authority of appellee controlled, it is immaterial whether there was a will or not, the only difference being that in case of an intestate, the land would descend to the heir under the statute, and in the case as here, by the will it passed to the devisee. In neither case do the rents and issues of the real estate accruing after death, go to the administrator or executor for the benefit of creditors in the absence of a specific provision in the will, and here there is none to that effect. The rents of the land were not in existence at the time the testator died, and could not have belonged to him; but when such rents were brought to existence the land had devolved and belonged to another, and likewise the

rent also. The appellee possessed no right to the rents, except as the will conferred the power to collect for the use of the beneficiary, affecting no legal right of the creditor, and at no time did they form any part of the lawful assets of the estate for distribution to creditors. This view is supported by *Bucher v. Bucher*, 86 Ill. 377, in which it was stated that the general rule is, that the executor or administrator has no concern with the real estate; he is not entitled to receive the rents and profits, but they belong to the heirs or devisees; the only power of the executor or administrator with respect to the realty is, as given by the statute, to petition the court for leave to sell it for the payment of the debts of the estate, and to make sale of it for such purpose upon license given and the general rule in this respect is not varied by will. The mere expression of a desire that debts be first paid, after which the property should go to the devisee, is no more than the law itself declares, and adds nothing to the law in this regard; and the powers and duties of the executor in respect to the application of the real estate, or the rents and profits of it to the payment of the debts, were no greater and none other than they would have been under the law without the will, and therefore the rents and profits belonged to the widow and devisee, and were not subject to be applied to the payment of the debts of the estate.

The administrator is the sole representative of the personal estate, but not of the real property. The latter descends to and vests in the heirs, over which the administrator has no control or concern, except a mere power to apply for an order to sell the same, when necessary for the payment of debts. It has been repeatedly decided that an administrator takes neither an estate, title nor interest in the realty, and that he can not support any possessory or real action, in law or equity, for the recovery or maintenance of possession or title, or to clear up title from clouds from adverse claims; that, if necessary to sell for the payment of debts, he must take the estate as he finds it. *Ryan v. Duncan*, 88 Ill. 144, and cases cited.

Our conclusion, therefore, is that in the decree of the Circuit Court there is manifest error, and it will be reversed and the cause remanded for proceedings not inconsistent with the views herein expressed. Reversed and remanded.

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### Lake Erie & W. R. R. Co. v. Theodosia Wilson, Adm'x.

1. MASTER AND SERVANT—*Duty of the Master—Province of the Jury.*—It is the duty of the master to furnish reasonably safe premises for the operation of his business, and it is the province of the jury to determine whether at the time of the injury the premises were so.

2. EVIDENCE—*Photographs.*—The admission of photographs in evidence is always subject to the discretion of the trial court, in view of other established facts, and when it is not shown that they lead to develop anything new or strengthen the proofs, their rejection is not error.

**Action for Damages.**—Death from negligence. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

H. M. STEELY, attorney for appellant; JOHN B. COCKRUM, of counsel.

MABIN & CLARK, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant was sued by appellee in this action on account of negligence resulting in the injury and death of Art. M. Wilson, appellee's intestate. The declaration, on two counts, of which only issues were joined, charges that appellant negligently permitted grass and weeds to grow between the rails of its side track at Rankin, Illinois, thereby rendering it dangerous and unsafe to couple and uncouple cars there, and that while Art. M. Wilson, in the discharge of his duties as switchman for appellant there, in the exercise of ordinary care for his own safety, was coupling cars, his



foot caught in such grass and weeds and he was thrown down and injured by the cars, which injuries resulted in his death; and that in like manner his death was caused by reason of a hole in the ballasting of such side track, in which deceased caught his heel. Trial by jury resulted in a verdict and judgment against appellant for \$2,000, which by this appeal it is sought to have reversed; various errors being urged, as alleged, to attain that object.

Appellee maintained a side track at Rankin, Illinois which was used for switching purposes. It is clearly shown though the evidence is conflicting in other phases of the case, that numerous weeds, called rag weeds, grew between the rails of this side track and that at a place where deceased fell a shallow depression existed by the side of a tie between the rails; and that the deceased, while acting in the line of his employment on the night of August 23, 1898, went on the side track to couple cars, and as the moving section of the train approached the standing car, he stepped his left foot between the rails to set the coupling pin and insert the link. Instantly the engineer received a signal to stop, and on doing so it was found that deceased had been caught by the wheels and dragged a considerable distance on the track, and his left leg crushed; from which injury he expired after a few hours. An impression, probably made by the heel of his shoe, extended the length of the distance he was dragged, from the depression or hole at the side of the tie where he stepped in. Much evidence was had relative to the size of this hole; but independently of its size it is well established such a place was there. To the credibility of a colored witness who testified at the instance of appellee, much impeaching evidence was directed. It further appears from the evidence that deceased had been employed by appellant for six months; and that it was customary in the performance of his duties in making couplings with link and pin to step one foot between the rails. Appellant offered proof that the side track was ballasted in the usual and customary manner; and objection being made to its introduction, the court sustained the objection, which action of

the court is considered by appellant prejudicial error. To the introduction of certain photographs offered by appellant, the court also sustained objections; which is also presented to this court as error. It is further urged that the court admitted improper and excluded proper evidence and gave improper and refused proper instructions; and that a motion presented and an instruction offered at the close of appellee's evidence, and again at the close of all the evidence, in substance, to exclude the evidence and direct a verdict for appellant, should have been allowed and given and was erroneously refused.

The testimony of the colored witness, a roving fellow, was to the effect that he was present when the injury occurred and was then holding a lantern for the deceased; and as Wilson stepped between the rails his left feet went into a depression and he sank to his knees where the wheels caught him. The witness also stated that a few minutes after the accident he took parts of weeds from the shoe latches of deceased. In view of the character of the impeaching evidence offered against the credibility of this witness it may be proper to discuss briefly the probative force of all the evidence exclusive of his testimony. When the deceased stepped with one foot between the rails to make this coupling, it so sufficiently appears that he was acting in the line of his employment in the usual and ordinary manner, under the circumstances then confronting him, that the ordinary mind is compelled to conclude that he was exercising that ordinary care for his own safety commensurate with the law of the land. Opportunities were there for producing just the accident which befell him—a depression or hole, and weeds growing about—and it is not without the bounds of ordinary human knowledge to conclude from all the circumstances in this record that such was the cause of his death. Certainly it was the duty of the master to furnish reasonably safe premises for the operation of this business; and it was the duty of the jury to determine whether at the time of the injury the premises were so. In this they found against appellant, which in the con-

dition of the proof must be taken as final. The proof tending to show that the condition of the ballast at this particular point was due to operations of other workmen of appellant, who had charge of this track, it surely follows that appellant is chargeable with notice; coming at last within all rules prescribing its liability in such cases.

As to the contention that it was error to exclude proof that the side track was ballasted and maintained in the usual and customary manner, we need only revert to the issues to determine that the general condition of the ballast of the track was not open to the consideration of the jury; it was only material what such condition of the premises was at the particular point of this occurrence, clearly defined by the evidence. With that in view it was wholly proper and not error to sustain the objection. While the photographs offered by appellant may have been admissible, as is contended, yet it is not seen that they develop anything new or strengthen the proof for appellant. Their admission is ever subject to the discretion of the trial court, in view of other established facts, which, sensible of its obligation relative thereto, excluded them. We can not hold that action of the court an abuse of that discretion; it was not prejudicial error.

According to the views expressed here, sufficient proof tending to uphold the position of appellee was presented at the times motions to exclude the evidence and instructions to direct a verdict were made, to warrant submitting it to the jury. Such was the action of the court and in it there was no error.

It being urged that several instructions were improperly given for appellee and some improperly refused for appellant, the instructions complained of have been carefully examined. It is found that no substantial error exists in the instructions. They seem to state the law applicable to the case, and the principles contained in those refused were contained in others given.

Finding no substantial error, the judgment of the Circuit Court will be affirmed.

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### George W. Wilson v. Carlinville National Bank.

1. RES ADJUDICATA—*Appellate Court Decisions*.—Under the provisions of the Appellate Court act the previous opinion rendered in a cause is of binding authority in the cause, not only upon the parties but upon the court.

**Assumpsit.**—Appeal from the Circuit Court of Macoupin County; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

BELL & BURTON, attorneys for appellant.

RINAKEE & RINAKEE, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This case was before us at a former time and is reported as Carlinville National Bank v. Wilson, 78 Ill. App. 339. For reasons stated in the opinion at that time the judgment of the Circuit Court was reversed and the cause remanded for a new trial. A new trial was had, in which a jury was waived, and resulted in a finding and judgment against appellant for \$339, to reverse which he prosecutes this appeal. The facts established by the evidence upon the second trial are substantially the same that appeared upon the first trial. Under the provision of the Appellate Court act the previous opinion filed in this cause is of binding authority herein, and however much disposed we might be to reconsider the reasons of the court for its decision expressed in that opinion, we have no right to do so. Such a practice would produce judicial chaos. That opinion and the reasons and the judgment of the court, expressed upon the same facts in the same case before us, are binding upon the parties herein and upon the court. It would be as much impertinence for us, as it would have been for the trial court, to disregard our former opinion. The case has been disposed of by the trial court in con-

Martin v. Martin.

formity with the law as we have previously stated it, and independently of the binding authority of the former opinion, we are well satisfied with our views as therein expressed, and reaffirm the doctrine contained therein.

The judgment of the Circuit Court will be affirmed.

William H. Martin v. Benjamin D. Martin, for use, etc.

1. GARNISHMENT—*Construction of Section 9 of the Act of June 22, 1893—Fraternal Beneficiary Societies.*—The money exempted from attachment by trustee, garnishee, or other process, under section 9 of the act of 1893, providing for the organization and management of fraternal beneficiary societies, is such as is to be paid by the society, not such as has been paid.

**Garnishment.**—Appeal from the Circuit Court of McDonough County: the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

SWITZER & MELOAN, attorneys for appellant.

SHERMAN & TUNNICLIFFS, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was a proceeding in garnishment by Benjamin D. Martin for the use of Ida L. McWhinney, his judgment creditor, against William H. Martin, in which the latter, as garnishee, answered that he, as agent of Benjamin D. Martin, had collected and then held in his possession for Benjamin D. Martin, the sum of \$1,700 which he received from the Supreme Court of Honor, a fraternal beneficiary society, on a certificate issued by that society upon the life of the wife of Benjamin D. Martin, in which her husband was the beneficiary, she being dead. The answer claimed that said money, being so received, was exempt from garnishment under the provisions of section number nine of the act of June 22, 1893, providing for the organization and manage-

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ment of fraternal beneficiary societies. That part of the answer claiming the money to be exempt, was demurred to and the demurrer sustained, and after hearing, upon the remaining part of the answer, and evidence establishing the existence and validity of the judgment, etc., which was the basis of the garnishment proceeding, the court gave judgment against the garnishee, from which he appeals to this court and seeks to effect a reversal because the money he confessed to having in his possession was exempt, as claimed in his answer.

Said section 9 is as follows:

"The money or other benefit, charity, relief or aid to be paid, provided or rendered by any society authorized to do business under this act, shall not be liable to attachment by trustee, garnishee or other process, and shall not be seized, taken, appropriated, or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder or of any beneficiary named in a certificate, or of any person who may have any right thereunder." Paragraph 266, Sec. 9, Chap. 73, Hurd's Illinois Statutes (1899).

As the answer of the garnishee showed that the money due the judgment debtor from the fraternal beneficiary society had been actually paid to him as the agent of such debtor, it was no longer exempt by the terms of said section, which only provides such exemption for the money, etc., to be paid, and was doubtless so made to enable such societies to transact their business without being subjected to the harassment of garnishee, or other legal processes aimed to intercept the money, etc., while it was to be paid by them to those they insured, or their beneficiaries. Had the legislature intended to create a general exemption in this respect, doubtless the subject would have been embraced in the title of the act, and it being absent therefrom, a question of its validity might arise if a different meaning was accorded to it.

It seems plain to us that the money exempted is such as is to be paid by the society, while here it had been paid. Finding no error in this record, the judgment of the Circuit Court is affirmed.

**William B. Hewitt v. The People, etc.**

1. **INTOXICATING LIQUORS—Cider.**—The question as to whether cider is an intoxicating liquor depends upon circumstances, and is a question of fact for the jury.

2. **SAME—Sale of Cider Under the Act of 1872.**—The protection intended by the act of 1872, entitled, "An act for the protection of farmers, fruit growers, vine growers and gardeners," is limited to farmers, fruit growers, vine growers and gardeners selling their products as such, and not intended to protect retail merchants, grocers, or keepers of drinking establishments in the sale of products which the ordinary vender must have a license to sell.

3. **SAME—Defined.**—"Intoxicating liquor," as used in the second section of the dram-shop act, means liquor that will intoxicate, whether hard cider, whisky, or beer, and if, in any case, the proof shows that the liquor sold was intoxicating, the seller comes within the spirit and letter of the act.

4. **STATUTES—Construction of the Act of January 13, 1872.**—The act of January 13, 1872, entitled "An act for the protection of farmers, fruit growers, vine growers and gardeners," does not authorize a farmer or fruit grower to sell any kind of intoxicating liquor, although sold by him as a farmer or fruit grower.

**Indictment for Selling Cider.**—Error to the Circuit Court of McLean County; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

**TIPTON & TIPTON**, attorneys for plaintiff in error; **CHARLES L. CAPEN**, of counsel.

**EDWARD C. AKIN**, Attorney-General, and **ROBERT L. FLEMING**, State's Attorney, for defendants in error; **O. R. TROWBRIDGE** and **J. A. BOHRER**, of counsel.

**MR. JUSTICE HARKER** delivered the opinion of the court.

The plaintiff in error was indicted and tried in the Circuit Court for selling intoxicating liquor without a license in violation of the dram-shop act. He was found guilty on each of the thirty-eight counts contained in the indictment and fined \$760.

The evidence heard upon the trial shows that the plaintiff in error, who is a coal mine owner and operator at Chenoa, Illinois, owns a farm in Livingston county, on which there is an orchard. In the fall of 1896, and fall of 1897, he manufactured from his apples large quantities of cider, which he sold in Chenoa by the barrel, by the gallon and by the drink. To prevent fermentation he put salicylic acid in each barrel, which, as he testified, prevented the cider from becoming intoxicating. That he sold a great deal of it at his place of business by retail, is not disputed; but it is claimed that being neither spirituous, vinous nor malt liquor, and being a product of his own orchard, he was authorized to sell it without a license by an act of the legislature, approved January 13, 1872, entitled "An act for the protection of farmers, fruit growers, vine growers and gardeners."

It is also claimed that the cider was not intoxicating.

To the contention that there was reversible error in the refusal of the court to grant a continuance on account of the inability of one of the attorneys of plaintiff in error, Charles L. Chapin, to attend the trial, it is sufficient to say that at the time of applying for a continuance, which was some ten days before the date of the trial, he had another able attorney retained and had ample opportunity to retain additional counsel after being informed by Mr. Chapin of an engagement in the Appellate Court that would prevent his being present.

As to the contention that the cider sold was not intoxicating, we only care to say that there were a number of witnesses who testified to drinking it frequently and that it was intoxicating. Quite a number who had drunk it testified that it was not; but in the conflict, it was the peculiar province of the jury to find the fact.

Complaint is made that the court, against objection, allowed the prosecution to prove a larger number of sales than there were counts in the indictment. By not limiting the prosecution to prove the thirty-eight counts contained in the indictment, it is urged the plaintiff in error was



greatly embarrassed in contesting the question of the intoxicating effects of the cider sold. As we look at the proofs in the record we can readily appreciate the embarrassment under which the plaintiff in error and his counsel labored before the jury; but this is the first time we have heard it urged upon a court of review that a judgment of conviction should be reversed because the prosecution made the proof of guilt too abundant. Although the jury was limited to a finding of guilty as to thirty-eight sales, the law did not limit the State's attorney to proof of thirty-eight or any number of sales.

The act under which it is contended the plaintiff in error was authorized to sell the cider without a license reads as follows:

"Be it enacted by the people of the State of Illinois, represented in the general assembly, that every farmer, fruit and vine grower, and gardener, shall have an undisputed right to sell the produce of his farm, orchard, vineyard and garden in any place or market where such articles are usually sold, and in any quantity he may think proper, without paying any State, county or city tax or license for doing so, any law, city or town ordinance to the contrary notwithstanding; provided, that the corporation authorities of any such city, town or village may prohibit the obstruction of its streets, alleys and public places for any such purpose. And, provided further, that nothing in this act shall be so construed as to authorize the sale of spirituous, vinous or malt liquors, contrary to laws which now are or hereafter may be in force prohibiting the sale thereof."

Authorities are cited holding that cider is not a spirituous, vinous or malt liquor. Wherefore, it is argued, the statute quoted applies and protects plaintiff in error in the sale of cider made by him from apples grown by him on his own farm. It is apparent to our minds that the protection intended by the act is limited to farmers, fruit growers, vine growers, and gardeners selling their products as farmers, fruit growers, vine growers and gardeners. It was not intended to protect a retail merchant, grocer, or keeper of a drinking establishment in the sale of products

which the ordinary vender must have a license to sell, simply because he produced them from his own farm, orchard, or vineyard. The sales of cider in question were made by plaintiff in error as a retail vender, from his place of business in Chenoa. Nor do we think the act authorizes a farmer or fruit grower to sell any kind of intoxicating liquor even when sold by him as a farmer or fruit grower. Section one of the dram-shop act defines a dram-shop to be a place where spirituous, vinous or malt liquors are retailed by less quantity than one gallon, and section two of that act, the one under which plaintiff in error was indicted, provides that whoever, not having a license to keep a dram-shop, shall sell any intoxicating liquor in less quantity than a gallon shall be fined, etc. The dram-shop act was passed two years after the act relating to marketing farm, orchard and vineyard products was passed. In considering the two acts together, the contention of plaintiff in error involves the construction that no liquors are intoxicating, within the meaning of the acts, except such as are either spirituous, vinous or malt. In other words, the farmer or fruit grower, without license, may sell in any quantity intoxicating hard cider and cause drunkenness *ad libitum* without being amenable to the provisions of the dram-shop act. In our opinion such construction would grossly violate the legislative intent. "Any intoxicating liquor," as used in the second section of the dram-shop act, means liquor that will intoxicate, whether it be hard cider, whisky, or beer; and if, in any case, the proof shows that the liquor sold was hard cider and was intoxicating, the seller comes within the spirit and letter of the act.

The instructions of the court upon the law of the case were in accord with the views above expressed. No error was committed upon the trial and the plaintiff in error was rightfully convicted. Judgment affirmed.

Wanack v. The People.

**Tobias Wanack v. The People, use of, etc.**

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1. **DRAM-SHOP ACT—Pleading and Practice.**—A declaration in a suit under the dram-shop act on a dram-shop keeper's bond which, without any reference to former proceedings and judgment against the principal, states in clear and certain terms that such principal sold to the deceased intoxicating liquor by reasons of which he became intoxicated and in consequence of such intoxication was killed, leaving a widow and children, etc., who were thereby injured in their means of support, discloses a breach of the obligation, sufficient to support a judgment on demurrer without the introduction of evidence.

Debt, on a dram-shop keeper's bond. Appeal from the Circuit Court of Christian County; the Hon. WILLIAM M. FARMER, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

RUFUS M. POTTS, JOHN E. HOGAN and JAMES L. DRENNAN, attorneys for appellant.

J. C. & W. B. McBRIDE and FRANK P. DRENNAN, attorneys for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was an action of debt by the appellees against appellant as one of the sureties upon the bond of Charles L. Wanack, principal, given under the provisions of section 5 of the dram-shop act. Appellant demurred to the declaration, which, being overruled by the court, he stood by the demurrer, whereupon the court gave judgment against him for \$3,000 debt, and \$2,000 damages, the debt to be satisfied upon payment of the damages, from which judgment he prosecutes this appeal, insisting that the court erred in such action, and in the admission of certain evidence afterward.

The declaration, after reciting the execution of the bond and the issuance of the license to Charles L. Wanack to keep a dram-shop, in substance avers the licensee furnished,

sold and gave to John Alexander intoxicating liquors, by reason of which, February 11, 1897, he became intoxicated, and in consequence of such intoxication fell from his wagon and was killed, and left the plaintiffs, appellees here, his widow and children, who were residing with him at the time of his death, and were thereby injured in their means of support.

The declaration then sets up the proceedings in the Circuit Court in the suit of the same plaintiffs against Charles L. Wanack, the person to whom said license was issued, and Peter Michels, the owner of the buildings in which the business was conducted, and the sales of the liquor made by which the injury ensued, and the judgment of the court in such case, by which plaintiffs recovered \$2,000 for injury to their means of support, in consequence of the death of John Alexander so occasioned.

The declaration then concludes, in substance, with the averment that by means of the statements contained in the declaration the plaintiffs have sustained damages to the amount of \$3,000, which the defendant has not paid, or any part thereof, nor the said Charles L. Wanack, nor the said Peter Michels, whereby and by force of the statute an action has accrued to the plaintiffs to demand of the defendant for the use, etc., \$3,000 as their debt, and the further sum of \$3,000 as damages.

The principal ground upon which it is insisted the judgment should be reversed, and the only one, in our opinion, possessing the merit of consideration, is that inasmuch as the former proceedings and judgment set forth in the declaration were under section 9 of the act in question, by which exemplary damages may be recovered in addition to actual damages, while under section 5 of the same act, upon which the present action is based, exemplary damages can not be recovered, as the latter section is construed by the decision of the Supreme Court, therefore such judgment in the former case, furnishes no basis for a recovery in this, and the court erred in overruling the demurrer to the declaration, for such reason.

It is an elementary rule of pleading that a demurrer admits all that is well pleaded in the pleading to which the demurrer is interposed, and applying this rule to the declaration before us, our conclusion is that the question sought to be raised in this court, and which we have above stated, does not necessarily arise, and we therefore express no opinion regarding it. By rejecting all that is said in the declaration concerning the former proceedings and judgment, there still remains stated a complete cause of action against the appellant, well pleaded and therefore admitted by the demurrer, including the averment of the amount of damages sustained to the means of support of the plaintiffs of more than an ample sum to cover the amount of the judgment given by the court; and so rejecting and disregarding, which we think may properly be done, the matter to which appellant objects, and on account of which he insists the demurrer should have been sustained, he is still liable by his own admission for \$3,000, and the judgment being for \$2,000 only, he is not in a position to complain. The declaration, without any reference to the former proceedings and judgment, states in clear and certain terms that the principal in the bond, sold and gave to John Alexander, the husband and father, intoxicating liquor, by reasons of which, February 11, 1897, he became intoxicated, and in consequence of such intoxication fell from his wagon and was killed, leaving the appellees, his widow and children, who were residing with him at the time of his death, and who were thereby injured in their means of support to the amount of \$3,000, thereby disclosing, as we think, a clear breach of the obligation upon which the suit is based, and sufficient to support the judgment that was rendered, and that, too, without reference to the evidence that was introduced after the demurrer was overruled. The introduction of such evidence was wholly unnecessary, and could have no effect whatever after the cause of action was admitted by appellant, and if its admission was error, it did appellant no harm. Finding no reversible error, the judgment of the Circuit Court will be affirmed.

**Chicago & Alton R. R. Co. v. Catherine Cullen, Adm'x.**

1. **FELLOW-SERVANTS**—*Trainmen and Section Foreman*.—Trainmen charged with the duty, upon discovering the defective condition of a car, to report it to the master for repair, and to discontinue the use of it until it is restored to a reasonably safe condition, are not fellow-servants of a section foreman killed in consequence of their neglect.

**Action for Damages**.—Death from negligence. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

A. E. DEMANGE, attorney for appellant; WM. BROWN, General Solicitor, and C. L. CAPEN, of counsel.

SAMPLE & MORRISSEY, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

In this action the appellant was sued by appellee for damages by negligence resulting in the death of John Cullen, intestate. The declaration, consisting of two counts, alleges that John Cullen was section foreman for appellant over a portion of the track including that part running two miles north of McLean, Illinois, and while in discharge of his duties as such, in the exercise of the ordinary care for his own safety, appellant negligently ran a freight train over that section of track with one of the car doors of a freight car in defective condition and out of repair, so that it swung out at the bottom from the side of the car when the train passed intestate and struck and killed him, leaving his widow and four children deprived of support. Trial by jury resulted in a verdict and judgment against appellant for \$5,000, from which this appeal is taken to effect its reversal, and it is urged as error that the court admitted improper evidence and excluded proper testimony; that the court denied the motion and refused the instruction offered

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at the close of appellee's testimony and again at the close of all the testimony to direct a verdict for appellant; that the court gave improper, refused proper and modified proper instructions.

The evidence shows that while deceased, in the discharge of his duties as section foreman, was upon the track about a mile north of McLean, a freight train approached, and the deceased and a workman with him, stepped off to the side, away from the track several feet, to the distance usually taken by workmen of that class when trains passed. As the engine went by him the deceased recognized and saluted a friend in the cab, whom he followed with his eyes; and directly his companion, the workman, gave a shout of warning and ducked his head; at the same time a boy walking upon the track near by, seeing the danger, quickly swerved out of the way. Almost instantly, and before deceased became aware of any peril, a loose door hanging from the side of a furniture car, swinging out, struck him in the back of the head and killed him. This car door was of a common sliding pattern, hung from the top, its bottom coincident with the floor of the car and confined to its proper place inside by a strip or band of iron out of which it was possible for the door to jump or bound by conjunction of favorable circumstances, in which event the bottom of the door would swing to and from the side of the car with the wind pressure and swaying of the car in motion. When closed, the door could be fastened by hasp and staple.

It further appears that while the train was yet several miles distant from the place of the injury, a brakeman discovered this door in its loose condition swinging in and out, the bottom of the door being free from its fastening, the hasp loose from the staple. The discovery was made on the occasion of the train breaking in two, and after the coupling had been made and the train again started. An immediate stop was made and the brakeman, assisted by others, made an ineffectual attempt to close the door in the usual manner and fasten it. The conductor of the train was apprised of the condition of the door and he, with the two brakemen,

replaced the door in its hangings, but on account of some disorder in the appliance, it could not be made to shut tightly so the hasp could be fastened, a space of two inches being left open. It is explained by them that lack of proper tools caused the failure to completely remedy this defect. Having arrived at Atlanta station, seven miles before Cullen was struck, a stop was made, and during the stay of the train here, the conductor again examined the door and, finding it in the same condition as when left by him before, no further attempt was made to fasten it. After leaving Atlanta no stop was made until after Cullen was struck; and none of the train crew saw the accident. The head brakeman, who rode on the engine, and the fireman, both testify they kept watch back over the train and did not see the door again swinging until after the accident.

Geometrical demonstration is invoked to prove that Cullen must have stood within three feet seven inches of the nearer rail when he was struck; and the calculation is based upon the assumption that the car door hung by both corners at the top properly. Very much strong proof, and the preponderance we consider, is against this contention, and to the effect that the car door hung by one corner only, and that Cullen stood more than five feet from the nearer rail. His workman stood the same distance away. They were men of long experience in the line of their employment. On the approach of this train they withdrew to a distance ordinarily safe; about the same space from the rails that was customary and usual. Having done that, in the absence of contributory negligence otherwise, we are impelled to conclude that the deceased was in the exercise of ordinary care for his own safety.

As against the charge of negligence on the part of appellant regarding the condition of the car door it is said appellant had neither time to discover the defect nor actual notice of it. The answer to this is that the trainmen, including the conductor, who were in charge of the train, not only knew of the defective condition of the door but endeavored to remedy it, and concluded that they had suf-



ficiently secured it when they desisted from their efforts to do so. It was the master's duty to use reasonable care to remedy this defect, so long as the door formed a part of the train, or upon knowledge of such defect to desist in the use of it, if it was dangerous to others, which latter fact the accident demonstrated. While it may be true the master, or some employe having the relation of vice-principal, had neither time to discover the defect or actual notice of it, yet the trainmen were not fellow-servants of the deceased, and it was their duty upon discovering the defective condition of the car, to report it to the master for repair, and to cease the use thereof until it was restored to a reasonably safe condition. This they neglected to do, and in consequence thereof Cullen was killed. As between appellee and appellant the latter is responsible for such negligence of its servants in charge of the train. Whether appellant's servants who managed the train were guilty of negligence, being a question of fact determined against appellant by the jury, it only remains to consider the evidence to say that conclusion was warranted. Having so considered the evidence we feel that such a conclusion was irresistible.

It is insisted that the court erred in permitting testimony concerning a switch-stand at Shirley, Illinois, some five miles from the scene of the accident, which this car door struck. We find evidence of that fact in the direct testimony of two of appellant's witnesses; and while the evidence complained of is not strictly material to the main issues involved, and might well have been excluded, it merely elucidates and explains the circumstances in detail. Had the evidence produced by appellant upon this point in chief been withdrawn, a different question might have been presented; but in the present condition of the record it is difficult to see that any harm was done by the admission of the evidence; indeed there was none. The second instruction for appellee, which it is said was erroneously given, we have carefully examined. It states the rule to be that if Cullen in the line of his employment was in the exercise of

reasonable care for his own safety, then he had the right to assume, in the absence of notice to the contrary, that appellant would use reasonable care and diligence to see that the car doors on a train running upon the track of appellant were in reasonably safe condition, and that the jury have the right to take that into consideration in connection with all the facts and circumstances, in determining whether or not, at the time he was injured, Cullen was exercising due and reasonable care for his personal safety. The force of criticism against this instruction is not seen. It does not single out any particular fact in the proof to appellant's prejudice, but is merely directed to the question whether the deceased was in the exercise of ordinary care, and states only general rules applicable to the determination of it; so that we can not say any harmful error to appellant resulted from giving it. It is quite needless to allude to the motion and instruction offered to direct a verdict for appellant, which the court properly refused. That no error exists in any of the other instructions, in giving, refusing or modifying them, is also our conclusion upon their examination, although fifteen of appellant's offered instructions were refused, while sixteen were given. We think the case was fairly presented to the jury for the appellant, and are convinced that the judgment of the trial court must stand.

The judgment of the Circuit Court will therefore be affirmed.

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**C. H. Albers Commission Co. v. Marcus Sessel, Ex'r.**

1. **WITNESSES**—*Stockholders in Corporations.*—At common law, a stockholder, being interested in the event of the litigation, was not allowed to testify, generally, in favor of the corporation.

2. **SAME**—*Objections to be Made in Apt Time.*—Where the testimony of a disqualified witness is given in the form of depositions, and no objection interposed at the time, nor in the court at any time preceding the trial of the cause, such objection at the trial only, is ineffective, for

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the reason that a failure to make it before that time operates as a waiver of the objection.

8. **LIMITATIONS**—*New Promise—Statements to Strangers.*—Statements made to a stranger, and not to the party claiming the indebtedness, do not waive the statute of limitations to a debt barred by it.

**Assumpsit.**—Claim in probate. Trial in the Circuit Court of Macoupin County, on appeal from the County Court; the Hon. ROBERT E. SHIRLEY, Judge, presiding. Verdict and judgment for claimant; appeal by defendant. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

JOSEPH S. LAURIE, attorney for appellant.

E. W. HAYES and BELL & BURTON, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant filed its claim for probate against the estate of Peter J. Hendgen, deceased, for a balance alleged to be due for loss in the purchase and sale by appellant, for the deceased, of May wheat, 1882. The claim was allowed by the County Court in the sum of \$1,743.03, and the case was appealed to the Circuit Court, where, after a trial by jury, appellant was defeated, and has appealed to this court, claiming various errors in the trial court, by which a reversal of its judgment is sought. The defenses interposed to the claim were the statute of limitations, and that the transactions out of which the claim grew were mere gambling in options.

The only evidence in the record by which the claim could be established is the testimony of Albers, Hazard and Kiersey, witnesses called by appellant, whose depositions had been taken and were read upon the trial. These witnesses were stockholders in the appellant corporation, and the testimony of each was objected to at the trial upon the ground of interest and incompetency. The court, however, overruled the objection, to which appellee excepted, and appellee has in this court assigned cross-errors upon the record, and insists that such action of the court was erroneous, and

argues that inasmuch as the only evidence for appellant upon the trial was incompetent, there is no evidence in the record to support a verdict in its favor, and therefore the verdict that was returned was right, and the errors here insisted upon by appellant, if any such exist, are immaterial and harmless. In Consolidated Ice Machine Co. v. Kiefer, 134 Ill. 495, where the suit was between an administrator and a corporation, it was held that a stockholder therein was interested, and therefore incompetent to testify generally, on behalf of the corporation, when called adversely to the administrator. At common law, a stockholder, being interested in the event of the litigation, was not allowed to testify, generally, in favor of the corporation. Thrasher v. Pike County Railroad Co., 25 Ill. 393, and cases cited. Tested by these decisions it is clear to us that Albers, Hazard and Kiersey, being stockholders, as they were, in the appellant corporation, were interested in the litigation, and were therefore incompetent to testify generally, as they did, on behalf of the corporation, having been called by it adversely to appellee.

It is, however, insisted that the objection to the competency of these witnesses was too late to be availing to appellee. That the testimony of the witnesses having been given in the form of depositions, and no objection having been interposed at that time, nor in the court at any time preceding the trial of the cause, that such objection at the trial only, was ineffective, for the reason that a failure to make the objection before that time operated as a waiver of such objection. There is force in this position. While it was held in Kelsey v. Snyder, 118 Ill. 544, that objection to the competency of a witness, who had testified in the form of a deposition, might be taken for the first time upon the hearing, still such statement of the rule was by the court limited to such witnesses as were incapable of being rendered competent by release, and the like, as at common law. Had this objection to the witnesses in this case been made at the first opportunity, it may be appellant could have procured them to divest themselves of their

interest as stockholders in apt time for the trial, and thereby have rendered them competent, and thus have secured the benefit of their testimony.

We come, then, to the consideration of the errors urged upon our attention by appellant, whereby it seeks to effect the reversal of the judgment of the trial court, which may be comprehensively stated to be that the verdict is against the evidence in the case, and the court refused proper instructions to, and misdirected the jury to the prejudice of appellant.

It is first complained that the evidence fails to prove that the transactions out of which the claims of appellant grew were of the nature of gambling deals in options, and upon this subject the court misdirected the jury. We find no warrant in the evidence that the claim of appellant is of such nature as to be justly characterized as falling within the prohibition of the statute concerning options, but on the contrary we think the positive evidence is to the effect that the grain was purchased by and delivered to appellant for Hendgen at his request, and by like request sold for his account, whereby the loss ensued. It may be fairly said, we think, there was no evidence upon which to base the instructions that were given to the jury upon this question, and if appellant has been prejudiced by such instructions, it will follow that the judgment must be reversed; and this brings us to the consideration of the remaining defense urged upon the trial—the statute of limitations.

The claim filed by the appellant, independently of the alleged credits, shows upon its face that the statute of limitations had run against it many years prior to its being filed, and unless there was proof of such an acknowledgment of the debt, and promise to pay it by the deceased, within five years prior to the filing of the claim, as would in law revive it, there could be no recovery, however clear and positive the proof of the original liability. And the authorities are clear that statements made to a stranger, and not to the party claiming the indebtedness, would not revive a debt barred by the statute. *Collar v. Patterson*,

137 Ill. 403, and authorities cited. In *Waldron v. Alexander*, 136 Ill. 562, the court held an instruction to be substantially accurate which stated that an acknowledgment within five years of the debt that would remove the bar of the statute of limitations, can not be inferred from any language or expressions which are equivocal, vague or indeterminate, and which lead to no certain conclusion, but the acknowledgment and promise to pay the debt, in order to avoid the bar of the statute, must arise out of such facts as identify the debt with such certainty as will clearly determine its character, fix the amount due and show a present, unqualified willingness and intention to pay it. Where payments operate to take a case out of the bar of the statute it is upon the ground that they amount to admissions that the debt is due. A new promise will not be inferred from a payment unless there is an actual, affirmative intention on the part of the debtor to make a payment upon the debt claimed to be due. There must be an intention on the part of the debtor to waive the bar of the statute. *Miller v. Cinnamon*, 169 Ill. 456, and cases cited.

We have examined the evidence contained in the abstract of the record to determine the fact whether the deceased had made a new promise, or made payments from which such new promise might be inferred, within five years of the filing of the claim. Aside from a mere reference by the witnesses to the account filed, and what it showed, which we think was not admitted or to be considered as evidence, there is but little testimony of witnesses having knowledge of any promise or payment made by the deceased, and such as there was, was wholly indefinite as to time, except the conversation stated by the witness Kiersey, had in 1892, more than five years before the claim was filed. Albers testified that the deceased told him the reason for not settling the account in full, that he was making a bare living out of his insurance business; that he did not have any money outside of that and could not pay, only as he could in that way. Had conversations with Hendgen in regard to his indebtedness frequently; he said the account was all right

but he could not pay anything. "I can not state that all this money was paid to me personally; more than likely to the bookkeeper."

Kiersey testified he saw deceased in October, 1892.

"Mr. Hendgen came into the office; he had a bill against us for premiums on insurance policies. He said to me: 'I owe Charlie (Mr. Albers—he always spoke of him in that way) some money and I am not able to pay it, but Mr. Albers gives me insurance. I place his insurance and will deduct from the bill ten per cent of the premiums and apply it to my credit on your account.' And I afterward did it that way. He brought in the bill and I immediately deducted ten per cent of the amount that was coming to him, and gave him a check for the difference and credited his account with the ten per cent."

It will be observed no time is stated, within the knowledge of any witness, when any of these conversations or transactions occurred, except the one in October, 1892. No witness has stated of his knowledge that within five years before the claim was filed the deceased promised to pay the claim, nor that he made a payment upon it, nor of the occurrence of any other fact from which such promise could properly be inferred. The language and expressions of the deceased were vague and indeterminate and led to no certain conclusion; did not identify the debt with certainty, nor clearly determine its character, nor fix the amount due, nor show a present unqualified willingness and intention to pay it. There is no legal evidence of such facts, and in such condition of the evidence the court might properly have given the instruction requested by appellee at the close of all the evidence directing a verdict for the defendant. No other verdict than the one that was returned would have been responsive to the evidence, and this being true, all the other errors of instructions given and refused, of which appellant makes complaint, were harmless and need no further consideration.

Finding no reversible error the judgment of the Circuit Court will be affirmed.

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r187s186**R. T. Hicks and W. F. Hess v. William L. Deemer.**

1. **FRAUD AND DECEIT**—*Procuring Land for Less than Its Value.*—A party who induces another to believe that the will of his father gives him less than a fee simple estate in certain lands and procures his interest in such lands for an amount far below its actual value, is guilty of fraud and deceit.

2. **ESTATES**—*Rule in the Shelley Case.*—A father devised to his son and his lawful heir 120 acres of farm land, worth \$6,000 or \$7,000, charged with several small bequests amounting to \$450. Afterward he executed a codicil in which he provided that the son should have the use and control of the land during his lifetime only, and that at his death the said lands should go to his lawful heirs, provided that he make the payments as stated in the original will. *Held*, that by the terms of the will and codicil, the son took the fee according to the rule in Shelley's case.

3. **PARTIES**—*Action at Law for Fraud and Deceit in the Purchase of Land.*—A person who has been defrauded of his lands can not be denied his right of action in a suit to recover damages for the consequences of a fraud practiced upon him simply because the legal title to the land was not in him at the time the defendant purchased it.

**Action in Case**, for fraud and deceit. Appeal from the Circuit Court of Pike County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

MATTHEWS & GRIGSBY, attorneys for appellant R. T. Hicks.

W. L. COLEY, attorney for appellant W. F. Hess.

WILLIAM MUMFORD and HUGH JOHNSTON, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$1,200 recovered by appellee against appellants in an action on the case charging them with fraud and deceit in the purchase of 120 acres of land which had been devised to appellee by his father.

A reversal is urged upon the following grounds:

1. The legal title to the land in question not being in



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appellee at the time it was purchased, he had no right of action at law against appellants.

2. The court erred in admitting in evidence the will and codicil of appellee's father, Jacob Deemer, unaccompanied by an order from the County Court showing the same had been admitted to probate.

3. The court erred in instructing the jury that appellee took a fee simple estate in the land by virtue of the will.

4. The evidence did not support the verdict.

The evidence in the record shows that in January, 1894, Jacob Deemer died, leaving a large quantity of land, several children and a will. By the second clause in the will, he devised to his "son, William Deemer, and his lawful heirs," 120 acres of farm land, worth \$6,000 or \$7,000, charged with several small bequests amounting to \$450. A few days before he died he executed a codicil to the will, which provided that William should have the use and control of the land "during his lifetime only, and that at his death said lands shall go to his lawful heirs, provided that he makes the payments as stated in the original will." Appellee is without education and of rather weak intellect. At the time of his father's death there were unsatisfied judgments against him and one Fisher, aggregating nearly \$2,000. Hearing that an effort would be made to obtain satisfaction of the judgments out of his inheritance, he executed a deed to his brother, Wesley Deemer, with an agreement, as he claims, that his brother would pay off the judgments, and on being repaid should re-convey the land to appellee's wife. Appellee continued in possession of the land and Wesley did not pay any of the judgments. Bills in chancery were filed in the Circuit Court to set aside the deed so that the land could be sold on execution from the judgments. Appellee consulted appellant Hess, a lawyer living in the adjacent village of Pearl, and through Hess a trade was effected with appellant Hicks. The result of the negotiations with Hicks was a conveyance of the land from Wesley Deemer to Hicks in consideration of Hicks paying off the judgments, the small bequests charged in the will

against the land and \$1,000 in cash for appellee. Hicks paid in all about \$3,000, and immediately conveyed the land to a third party for an expressed consideration of \$7,200, but for an actual consideration, as it is claimed by appellants, of \$5,400.

The frictional question upon the trial was whether the appellants were guilty of fraud and deceit in procuring the interest of appellee in the land for an amount far below its actual value, with the belief resting upon appellee's mind that the will of his father gave him less than a fee simple estate.

We can not agree with counsel that appellee had no right of action of law against appellants because the legal title to the land was not in him at the time Hicks purchased. This was not a suit to cancel the deed to Hicks, or to anywise call in question the title obtained by him or his grantee. It was a suit to recover damages for the consequences of a fraud practiced upon the injured party.

Although the rights of appellee in the property after his conveyance to his brother were purely equitable, he had such an interest as to entitle him to ask a court of law, in an action on the case, to determine the damages sustained by him in the fraudulent transaction which deprived him of it.

A defendant having demurred to a declaration which sets up in detail the plaintiff's cause of action, is in no position to urge that the remedy of the plaintiff is in equity and not at law after filing pleas at bar. Such is the position of appellants in this case. Having pleaded to the merits and gone to trial, they can not now urge objections to the jurisdiction of the court.

To the contention that the court erred in allowing the will of Jacob Deemer to go to the jury because no order of the County Court admitting it to probate accompanied the will, it is sufficient to say that specific objection was not made at the time the will was offered in evidence.

The court correctly instructed the jury that William Deemer, by virtue of his father's will, became the owner of

the land in fee and properly refused to instruct them that by the codicil he became vested in a life estate only. By the terms of the will and codicil he took the fee according to the rule in Shelley's case. *Baker et al. v. Scott*, 62 Ill. 86; *Brislain v. Wilson et al.*, 63 Ill. 173; *Wicher et al. v. Ray*, 118 Ill. 472.

A careful examination of the evidence in the record satisfies us that the negotiations were carried on with the belief resting upon the mind of appellee that the will of his father gave him only a life estate in the land; and in this belief he concluded the negotiations.

His consent to the trade was given under the belief that on his death the land would go to his children, notwithstanding his deed to Wesley Deemer and the deed of Wesley Deemer to Hicks. The mere fact that he made the trade under such mistaken belief of his rights and for a consideration far below the actual value of the land would not entitle appellee to recover, of course. To render appellants liable it must appear that they were, in some manner, instrumental in increasing that belief in appellee, or in confirming it after they found he had it. If the testimony of appellee is true, then Hess is, perhaps, more responsible than any other person for appellee's having such belief. He testified that he sought the advice of Hess when he heard judgment creditors were about to levy executions on the land; that he employed him as an attorney to look into the matter and examine the will; that Hess made such examination and advised him that all the interest that could be sold on execution was a life estate, and that his children would have the land in the end. He further testified that he had numerous conversations with Hess when the trade with Hicks was under consideration, in which Hess told him that he had but a life estate and that at the time the trade was consummated, it was distinctly stated that appellee was selling only a life estate. He was squarely contradicted by Hess; but it was the peculiar province of the jury, in the conflict, to say where the truth was. We are not inclined to say that they should have believed Hess and not appellee.

What fraud attached to Hicks sufficient to render him liable?

By his own testimony, Hess was employed by him as agent to purchase the land. Hess seems to have acted in the dual capacity of legal adviser for appellee and purchasing agent for Hicks. It does not appear that Hicks should enjoy the fruits of the fraud and deceit of his agent without being liable, in some measure, to the party defrauded. In addition to that, there is the testimony of appellee that on the night when the trade was concluded he stated to Hicks and others present that the sale included his life estate only, and to that Hicks assented.

When we consider the limited mental capacity of appellee, the failure of Hess to correctly inform him that he took a fee simple estate in the land under the will, the reliance of appellee upon the advice of Hess as a lawyer, the fact that Hess engineered the trade as an agent of Hicks and that Hicks must have known, at the time the trade was concluded, that appellee had been overreached, we feel that justice requires the affirmance of the judgment. Judgment affirmed.

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### Prentiss D. Cheney v. N. D. Ricks et al.

1. **TENANTS IN COMMON—*Liability for Rents.***—In the absence of fraud and want of ordinary diligence, the accounting of rents between tenants in common should be upon the basis of the rents actually received.

2. **SAME—*The Theory of Liability for Rents.***—The theory of the liability of tenants in common for rents, proceeds upon the fact of a certain fiduciary relation imposed upon the parties where one or more of the tenants in common assume to represent all the interests by possession, and this partakes of a mixed aspect in legal contemplation; and where, in the absence of fraud and want of ordinary diligence, it may be presumed that those accepting the liability will, by acting in their own interests, enhance that of the others.

3. **INTEREST—*Must Be Claimed in the Court Below.***—A claim for interest upon the amount of rents claimed to be due to a tenant in common in a partition suit must be made in the court below. It can not be raised for the first time in the Appellate Court.

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**Partition.**—Appeal from the Circuit Court of Christian County; the Hon. WILLIAM M. FARMER, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

FRANK P. DRENNAN, attorney for appellant.

PROVINE & PROVINE and JAMES B. RICKS, attorneys for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was originally a bill in partition by appellees against appellant; and an appeal having been taken from the original decree of partition to the Supreme Court, that branch of the case was there determined and is reported as *Cheney v. Ricks*, 163 Ill. 533; another and different feature of the matter also appears in *Cheney v. Tesse*, 108 Ill. 473. By inspection of the opinions there found much of the nature and history of this case may be learned.

In accordance with the decision of the Supreme Court, on August 22, 1898, the decree confirming the report of the commissioners in partition was entered, by which three-fifths of the real estate in controversy was set off in severalty to appellant, and the remaining two-fifths jointly to appellees George E. Maxon and William M. Provine, and the cause referred to a master in chancery to state an account of rents and profits, with proper allowances and deductions, between the parties relative to such real estate. The master reported the evidence and his findings to the court after overruling objections to it, where appellant preserved exceptions to the report which the court on final hearing overruled, approved the report and granted a decree accordingly in favor of appellant against appellees Maxon and Provine for \$1,817.23 as in excess of their share of the rents and profits. From this decree appellant appeals to this court and seeks its reversal, urging mainly that the method by which the account was rendered by the master was erroneous and that appellees should have been held to account for the reasonable rental value of the actual rents received.

It appears that appellees Maxon and Provine by purchase, and appellant by descent, were tenants in common of this land, some 5,481.28 acres, from March 10, 1895, to August 22, 1898; and that during the period appellant received one half, and appellees Maxon and Provine the rent from the other half, so that upon setting off three-fifths of the land to appellant, appellees became liable to account to him for the difference in what they took and used in greater proportion than their interest. *Wooley v. Schrader*, 116 Ill. 29. Thus they would be liable to appellant for one-tenth of the benefits derived.

At this point appellant insists that the measure of that benefit, in any event, is the fair rental value of the land, during the period, and has directed his proof and argument chiefly along that line; while the appellees reply that inasmuch as they rented the lands out, which in fact they did, they should only be charged with rent actually received. The cases of *Holderman v. Graham*, 61 Ill. 364; *Mahoney v. Mahoney*, 65 Ill. 406; *Chambers v. Jones*, 72 Ill. 275; *Groves v. Miles*, 85 Ill. 85; *Wooley v. Schrader*, *supra*; *Angelo v. Angelo*, 146 Ill. 629 and *McParland v. Larkin*, 155 Ill. 84, are cited in the support of appellant's contention. Separate discussion of each of these cases seems unnecessary. Suffice it to say that they announce the law as it is now understood in this State upon the principles involved; but in neither instance can this court determine from the reasoning and language of those opinions that it was intended to decide that where a co-tenant had received specific rent for the use and occupation of the estate in greater proportion than his interest he should nevertheless be held to account to other co-tenants for the reasonable rental value of the estate. Indeed, that case does not seem to have been considered in the authorities mentioned. On the other hand there are cogent reasons against the position taken by appellant why, in the absence of fraud and want of ordinary diligence, the accounting should be had of rents actually received where this question arises. It is well established that the theory of liability in such a case does not proceed upon the existence of a promise,

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express or implied, for the appropriate remedy on that score is denied. *Crow v. Mark*, 52 Ill. 332. It rather proceeds upon the fact of a certain fiduciary relation imposed upon the parties where one or more of the tenants in common assume to represent all the interests by possession, which partakes of a mixed aspect in legal contemplation; and where, in the absence of fraud and want of ordinary diligence, it may be presumed those accepting the liability will, by acting to their own benefit, enhance that of the other interests. This question, though it may appear new as applied to tenants in common, is well settled in other relations partaking somewhat of the features of the case in hand. In *Moshier v. Norton*, 100 Ill. 63, and *McDole v. McDole*, 39 Ill. App. 274, it was held that a mortgagee in possession and a tenant *per autre vie* in possession are ordinarily held only to account for actual receipts, in the absence of gross negligence and want of reasonable diligence; and not for the reasonable rental value of the lands; and so far as these cases touch that of the tenant in common in possession, and to the present case they seem most applicable, the rule should be of equal force and justness. Again, in the case of *Payson v. Ross*, 77 Ill. App. 635, it is of considerable weight that the same rule was adopted in making the account there decreed, which it seems was recognized to be the true measure in a controversy similar to that under discussion. There is no evidence in this case of willful default, gross neglect or any want of ordinary diligence on the part of Maxon and Provine in securing proper benefits of the use of this land, and the court can not escape the conclusion that they were properly charged in the decree with the amount of the rents actually received. The principle is well sustained in its application to the facts in the case presented, and can work no hardship upon appellant; to require appellees to account for the rental value of the estate held by them, if that should exceed the rents received, would, in the absence of proof of willful default, gross negligence or want of ordinary diligence, be harsh upon them, and not warranted by the evidence. The decree in that regard is faultless.

The other contention of appellant against the decree relates to the method of stating the account adopted by the master and approved by the court; and first it is here insisted that in such accounting interest should have been allowed appellant on the sum so found due him. The question concerning interest is for the first time raised in this court, and, as frequently held in similar circumstances, for that reason we must decline to pass an opinion upon the merits of that insistence. So far as it is permitted to be discovered from the abstract of the record, no claim for such interest was made in the trial court.

It appears that in setting off these lands some seven hundred acres which had been held by Maxon and Provine became the property of appellant, and that in like manner one hundred and twenty acres which had been held by appellant was set off to Maxon and Provine; and it is contended by appellant that the accounting should have been made to embrace transactions touching these portions only. But we think this point also without force. Previous to the decree confirming the report of the commissioners, the interests were undivided and it could not without judicial determination have been said that appellant was entitled to the possession, exclusive of any specific tract of the land. Appellees were entitled to take and use in proportion to their interests in the whole body of land; but as they took and used more than that proportion, they are liable to account for the excess, and that must be determined with reference to the tract occupied and the whole, and all the interests, and not to any exclusive interest in a portion. In taking this account the decree confirming the report of the commissioners gave appellant no rights of account which he did not have before.

Concerning the method pursued by the master to obtain this account it seems that he required the parties in the first instance to strike off their own accounts and submit them to him. That of appellees Maxon and Provine, it appears, was partly prepared by a clerk, to which exception was taken by appellant. The account was testified to be cor-



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rect, and we can see no reason why the intervention of clerical services in the tabulation should avoid it. It further appears that no item of appellees' account as rendered, was disputed by any evidence offered, except the claim of Maxon to commissioners for services in and about the collection of the rent, which claim was rejected by the master; and that action of the master is recognized by appellees as proper. So far as can be seen this mode of accounting was regular. *Patterson v. Johnson*, 113 Ill. 559; and there is no doubt from the evidence that it resulted in an equitable and just determination of the true amount due to the appellant from Maxon and Provine for the enjoyment of a greater proportion of the common estate than their interests. Most of the rents received by appellees were in grain which they held, making gain, the total rents and profits received being \$21,015.06. This was charged against them and they received credit for all taxes during the period paid upon land and grain, insurance premiums on the property insured, labor in and about caring for the grain, received as rent, for its protection and preservation, marketing it and for certain seeds, such credits amounting in all to \$2,842.73, leaving a balance, being the net rents and profits, of \$18,172.33, of which appellant is entitled to one-tenth, as stated above. This the decree approved. The court is unable to discover anything in the proceedings, as complained of, prejudicial to the appellant; and therefore the decree of the Circuit Court will be and is affirmed.

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**J. Ogden O'Hair v. L. Dow Morris.**

1. **BURDEN OF PROOF**—*Sale of Diseased Animals*.—Under the averments of the declaration, in this case the burden of proof is upon the plaintiff to prove that "the hogs died of cholera," and that the defendant at the time of exposing them for sale knew them to be afflicted with that disease, or had been exposed to it.

**Action in Case**, for selling diseased animals. Appeal from the Circuit Court of Edgar County; the Hon. HENRY VAN SELLER, Judge, pre-

siding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

DUNDAS & O'HAIR, attorneys for appellant.

VAN SELLER & SHEPHERD, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This suit was brought by appellant to recover damages from appellee for selling to him hogs afflicted with hog cholera.

The declaration charges that the defendant was the owner of twenty-five hogs which he sold to the plaintiff; that the hogs were at the time of the sale apparently healthy but were in fact afflicted with cholera; that the defendant knew the hogs had been exposed to that disease and were at the time afflicted with it, but sold them to the plaintiff as sound and healthy; that after the plaintiff had taken possession of the hogs and moved them to his premises they died of cholera, and communicated the disease to other of his hogs, of which they likewise died.

An issue was formed upon a plea of "not guilty," and a trial had, resulting in a verdict and judgment for the defendant.

A reversal is urged because of the errors of the court in ruling upon testimony, and in passing upon instructions to the jury.

Under the averments of the declaration, it devolved upon appellant to prove that the hogs died of cholera, and that appellee, at the time of exposing them for sale, knew them to be afflicted with that disease, or had been exposed to it. There is no proof whatever that the hogs died of cholera. For aught that appears in the record they may have died of some other disease.

The alleged errors of the court in ruling upon testimony do not relate to what disease the hogs died of, but to the knowledge of the plaintiff as to their being healthy. By no ruling of the court was appellant at all limited in proof of what disease the hogs died.

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Some of the instructions are subject to criticism, but as no other verdict than that rendered could stand under the averments of the declaration and proofs, the judgment must be affirmed.

**Lou C. Lurton et al. v. The Jacksonville Loan & Building Association.**

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1. **BUILDING AND LOAN ASSOCIATIONS—*Supplying Omissions in the Minutes.***—It is competent for a building and loan association to supply an omission in the minutes of its meetings by oral testimony.

2. **SAME—*Estoppel of its Members.***—A person who becomes a member of a building and loan association by making a successful bid for a loan is estopped from setting up the irregularity of the meeting at which he made his bid.

3. **ESTOPPEL—*To Make the Defense of Ultra Vires.***—A party can not avail himself of the defense of *ultra vires*, when the contract has been in good faith performed by the corporation and he has had the full benefit of such performance.

**Foreclosure.**—Appeal from the Circuit Court of Morgan County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

C. EPLER and GEORGE L. MERRILL, attorneys for appellants.

L. O. VAUGHT, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This suit was brought by appellee to foreclose a mortgage executed by Lou C. Lurton, and William S. Lurton, her husband, to secure the payment of a promissory note made by her to appellee on the 5th of June, 1893. The consideration of the note was fifty-five shares of building and loan stock in appellee, subscribed for by her at a premium of eighteen per cent, on which she received an advance payment of \$4,510.

The bill alleges default in payment of interest, fines, etc., and that such default had worked a forfeiture of the mort-

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gaged premises. Appellants interposed the defense of usury, claiming in their answer that appellee was not a building and loan association within the intent and meaning of the statute, but a mere money-lending concern, transacting its business under the guise of a building and loan association. They contended that the amounts paid, aggregating \$2,500, should be applied as credits on the \$4,510 actually received, and that the court should declare the balance as the amount due to appellee.

The cause was referred to the master in chancery to take proofs and state the account. On the coming in of the master's report a few minor charges against Mrs. Lurton were eliminated and a decree for \$4,661.18 and costs was rendered by the court.

Appellants insist upon a reversal of the decree because the loan contract was usurious. They rely upon three points: First, that the money borrowed by Mrs. Lurton was not offered to the highest bidder in an open meeting of the board of directors and bid off by her at eighteen per cent premium, but that the directors arbitrarily fixed the premium which she had to bid in order to secure the loan. Second, that appellee, having obtained its loaning fund in part from non-borrowers by issuing to them paid-up stock, thereby ceased to be a building and loan association within the intention and meaning of the statute, and lost its right to the privileges and immunities granted by the statute to such associations. Third, that a stipulation contained in the mortgage allowing the association to pay taxes, insurance and assessments which the mortgagor had failed to pay, and that all money so paid should become additional indebtedness, with interest at the rate of eight per cent, tainted the whole loan contract with usury.

It appears from the evidence that Mrs. Lurton, who was constructing a dwelling house on the mortgaged premises, made application, through her husband, to appellee, to become a member of the association, and for a loan. At a meeting of the directors on the 20th of February, 1893, a committee was appointed to examine into and report upon

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the application. At a meeting on the 27th of February, there was an informal discussion of the matter, and at a meeting held on the 6th of March, the directors agreed to loan Mrs. Lurton \$1,500 on the property, on condition that the house then under construction should be completed according to certain plans and specifications, and turned over without incumbrance, at a bid of eighteen per cent premium. Thereupon Mrs. Lurton made her formal written application as follows:

"4,510. JACKSONVILLE, ILL., March 6, 1893.

I hereby apply for a loan of forty-five hundred and ten dollars, net, on 55 shares of stock of the Jacksonville Loan and Building Association, at 18 per cent premium, on my property situated on west side of Webster avenue, in Jacksonville, Ill., valued at \_\_\_\_\_ dollars, yearly rental \_\_\_\_\_ dollars.

"LOU C. LURTON."

The secretary of the association testified that Lurton was present at the regular meeting of the board on the 20th of February and made a bid of the same premium as that made at the last sale of money, which was eighteen per cent. His testimony is not contradicted and is a complete refutation of the contention that the directors arbitrarily fixed the premium. It is insisted that his testimony, with the testimony of others corroborating him, contradicts the minutes of March 6th, and was, therefore, inadmissible. We think not. It merely shows that had been done before that time. The record of January 20th did not show all that was done at that meeting. The transactions of that meeting should have been entered in full, and properly attested, but that was not essential to their validity or proof. It was entirely competent to supply an omission in the minutes by oral testimony, its effect being merely to explain or add to, and not to contradict the recorded minutes. Endlich on Building Associations, Par. 184, 185.

To the contention of appellants that no bid could have been entertained or acted upon at the meeting of February 20th because at that time Mrs. Lurton was not a member of the association, it is only necessary to say that she is

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estopped from setting up that irregularity. By the transaction she became a member of the association, received the money upon the terms of her oral bid, and, up to the time of her default, recognized the contract as valid. It is well settled that a party can not avail himself of the defense of *ultra vires*, when the contract has been in good faith performed by the corporation and he has had the full benefit of such performance. *Kadish et al. v. Garden City Equitable Loan and Building Association*, 151 Ill. 531; *Freeman v. Ottawa B. H. & S. Ass'n*, 114 Ill. 182; *Conservative B. & L. Ass'n v. Cady et al.*, 55 Ill. App. 468; *Bates v. Equitable B. & L. Society*, 65 Ill. App. 529; *Carson City Savings Bank v. Elevator Co.*, 90 Mich. 550; 2 *Parsons on Contracts*, 790.

We see nothing in the evidence to justify the contention that appellee has forfeited its rights as a building and loan association. A few of the members did make payments for stock in advance and not periodically, as provided by the laws of the association. But we are unable to see how any member was prejudiced thereby; and if they were, appellants, under the authorities above cited, could not urge that as a defense.

We do not think the stipulation in the mortgage allowing appellee to pay for taxes, assessments and insurance which the mortgagor had failed to pay, and that all money so paid should be added to the debt and bear interest at the rate of eight per cent, tainted the entire contract with usury. The court refused to allow any interest whatever on those items, but refused to carry the usury defense farther. We approve the action of the Circuit Court in that regard.

Neither one of the contentions urged by appellants is supported by the record. Decree affirmed.

**Shepard B. Betser v. Elizabeth Betser.**

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1. **WAIVER**—*Of a Demurrer by Pleading.*—By pleading to the declaration a demurrer thereto is waived.

2. **ERROR**—*When it Becomes Harmless.*—Where a defendant upon the trial has the benefit in evidence under the general issue of the matters contained in a special plea, the error in wrongfully sustaining a demurrer thereto, becomes harmless by subsequent proceedings in the case.

3. **INSTRUCTIONS**—*Erroneous, When Not Reversible Error.*—An instruction submitting to the jury the right to determine what are the material issues in the case, is erroneous, but is not reversible error if the court can see that it did no harm.

4. **APPELLATE COURT PRACTICE**—*When a Judgment Will Not be Disturbed.*—Where no prejudicial errors appear to have occurred in the admission or rejection of evidence or instructions of the court, and the evidence of the successful party, standing alone in the record, will support his verdict, an appellate tribunal will not disturb it on the ground that it is not supported by the evidence.

5. **HUSBAND AND WIFE**—*Right of the Wife to Maintain an Action Against a Third Person for the Alienation of the Affections of her Husband.*—Whatever may have been the right of the wife in this regard at common law, under the legislation of this State she may maintain an action for the alienation of her husband's affections and causing a separation between them.

6. **SAME**—*Agreements to Live Apart.*—A written agreement between husband and wife by which, in consideration of \$3,000 in property and \$100 in cash paid to her, she assumes to release her marital rights with her husband, and in which a separation and living apart are provided for, is wholly futile as a defense to an action for alienating the husband's affections, and can not affect the right of either to demand a return to cohabitation.

**Action for Alienating a Husband's Affections.**—Appeal from the Circuit Court of McLean County; the Hon. JOHN H. MOFFETT, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

**TIPTON & TIPTON, E. O'CONNELL and FIFER & BARRY,**  
attorneys for appellant.

**WELTY & STERLING and JOHN E. & MAYNE POLLOCK,**  
attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This suit is an action on the case brought by appellee against appellant to recover damages for the malicious and wrongful interference with her marital relations with her husband, William L. Betser, for alienating his affections and causing him to abandon her. A demurrer was interposed to the declaration which the court at first sustained, but after amendment it was overruled, and the defendant pleaded three pleas: first, the general issue; second, a written agreement between husband and wife, by which, in consideration of \$3,000 in property and \$100 in cash paid to the wife, she assumed to release her marital rights with her husband, and in which a separation and living apart was declared; and third, the pendency of a suit between appellant as plaintiff and the brother of appellee as defendant, that was to have been dismissed as part of the settlement between husband and wife and was not, to which second and third pleas the court sustained a demurrer. A trial by jury ensued, resulting in a verdict against appellant for \$3,700, upon which, after overruling appellant's motion for a new trial, the court gave judgment, to reverse which this appeal was taken. To effect a reversal of the judgment appellant has assigned and urged upon our attention in his argument numerous alleged errors of the court, which may be comprehensively stated: first, the court erred in overruling demurrer to declaration, and sustaining demurrer to pleas; second, in the admission and rejection of evidence; third, misdirected and refused proper instructions to the jury; and fourth, in overruling the motion for a new trial and rendering judgment.

By pleading to the declaration the demurrer thereto was waived, which relieves us of the consideration of that assignment of error. Appellant, upon the trial, had the benefit in evidence under the general issue of the matters contained in the second plea, and hence if it was error to sustain the demurrer thereto, it became harmless by subsequent proceedings in the case, and it is obvious the third plea presented no defense whatever.



Upon examination we find no adverse prejudicial ruling of the court against appellant upon the admission or rejection of evidence. The instructions were voluminous and full. Many complaints and criticisms are made against them. It would extend this opinion to unreasonable length to take up and discuss each point separately, which we are not inclined to do. We have considered these points and upon examination we are of the opinion that the instructions, as a whole, present the law of the case as fairly as the rights of the appellant, and the issue being tried, demanded. It would be unusual if among so many instructions, appellant having offered sixty-four, the court did not make some mistakes, but we find no prejudicial error in this respect, and all that was proper in the refused, was contained in the instructions given. It is complained specially that the court submitted to the jury to determine what were the material issues in the case, and while this sort of instruction is improper and erroneous, yet it will not always reverse if the court can see it did no harm. Here the jury could not have been misled, for there was but one material issue of fact. While the evidence was conflicting upon the question whether appellant wrongfully and maliciously caused his brother, William L. Betsor, to abandon his wife, which was the issue tried by the jury, we feel compelled to accept the verdict of the jury and the approval of the trial judge, who heard and saw the witnesses, as decisive of this question. Where no prejudicial errors have occurred in the admission or rejection of evidence or instructions of the court, and the evidence of the party to whom the verdict was given, standing alone in the record, will support such verdict, and we think the evidence of the appellee does this, an appellate tribunal will not disturb the verdict on the ground it is not supported by the evidence. The decisions upon this point are so numerous and familiar as to supersede the necessity of citing them.

It is urged by counsel for appellant that a wife can not maintain an action against a third person for the alienation of the affections of her husband and the consequent loss of

his society at common law or under the statute. This court is committed to a different ruling. In *Huling v. Huling*, 32 Ill. App. 522, it was said: "Whatever may have been the right of the wife in this regard at common law, there is no doubt, under the legislation of this State, she may maintain the action," citing *Bassett v. Bassett*, 20 Ill. App. 543. We are satisfied with this declaration of the law applicable to the rights of a married woman, and believe the reasoning upon which it is based is sound and consistent with the causes that led to the adoption of the legislation in that regard.

In respect to the contention of appellant that the right of the wife to maintain an action for the alienation of her husband, and causing a separation between them, must be based upon a property right, we dissent. While some respectable authorities may be found in support of this position, in the absence of specific and binding authority in this State, and none has been cited, and we are aware of none, we are unwilling to follow or adopt them. While it is true that at common law and under our statute, marriage is regarded as a civil contract, yet we know that it is entirely *sui generis*, and is called a civil contract doubtless to distinguish it from the nature of a sacrament attributed to it by certain establishments or jurisdictions. Unlike contracts relative to property rights, for reasons of public policy, it can not be changed or dissolved by the consent of the contracting parties. It is more a relation of the parties to each other, and to the State, than it is to a contract. To assume such relation with more than one person during the same period of time is criminal. Any contract of the parties made during the existence of the marriage, intended to affect the *status personæ*, or relation of the husband and wife, sometimes called the *consortium*, aside from mere property rights, in the interest of public policy and the good morals of society, is in our opinion absolutely void, and incapable of enforcement, or of sustaining or defeating any right or cause of action whatever, whether of the person concerned or of third parties. Married parties can not do

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what the law forbids to be done on their agreement, namely, so to live in separation as to cut off the unforfeited right of either to demand a return to cohabitation; hence such separations are, as to the mere question of living apart, contrary to the law and its policy, and void. Bishop on Marriage and Divorce, Vol. 1, Sec. 1268. The agreement between appellee and her husband under which they lived apart, and by which she received \$3,000 in property and \$100 in cash, is therefore wholly futile as a defense to the action for alienating the husband's affections and causing him to abandon the wife, for the reason that it could not affect the right of either to demand a return to cohabitation. Such contract was not and could not be a satisfaction of the right of the wife to make demand upon her husband for that which the marriage relation is primarily instituted and maintained among members of civilized society, and therefore could not be a satisfaction for her demand against appellant for a wrongful estrangement of the husband, whereby the *consortium* of the husband was lost to her. The exclusion of the greater, in which the less is contained, mathematically excludes the less. Legally speaking the marriage relation is incapable of extinguishment save by death or divorce, although it may be impaired by the wrongful alienation of one of the parties. Actions of this nature by the wife are unusual. They are generally brought by the husband for the alienation of the wife, and the husband's right to maintain such an action is unquestioned. No reason is perceived why the principles governing such actions should be different in this case. They are the same, and none other. The declaration named the husband as Louis Betser, while the evidence showed his proper name is William L. Betser. Appellant claims this a fatal variance. The evidence shows he was also called Louis Betser. There was no variance.

Finding no reversible error in the record and proceedings of the Circuit Court, its judgment will be affirmed.

**Thomas H. Bradley, Adm'r, etc., v. Effie Gardner.**

1. **HARMLESS ERROR**—*Declarations of Deceased Persons.*—In an action against an administrator to recover the value of services rendered for a deceased person it is error to admit in evidence declarations of the deceased, made shortly prior to her death, as to her intentions in leaving a portion of her property to the plaintiff. Such matter is foreign to the inquiry, but in this case the court does not think that it is so seriously prejudicial as to call for a reversal of the judgment.

2. **BOOKS OF ACCOUNT**—*Foundation for Their Introduction in Evidence.*—It is error to admit in evidence an account kept by a deceased person showing amounts of cash paid, etc., without the proof required preliminary to the introduction of a book account.

**Assumpsit**, for services rendered. Error to the Circuit Court of Fulton County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

W. SCOTT EDWARDS and H. W. MASTERS, attorneys for plaintiff in error.

HARRY M. WAGGONER, attorney for defendant in error.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$400 recovered by defendant in error for services rendered the intestate of the plaintiff in error.

The evidence shows that for the last five or six years of the deceased's life defendant in error lived in her family, did her housework and assisted in carrying on a dressmaking business. She was to receive \$2 per week as a house servant and one-half of the earnings of the dressmaking business.

Her claim upon the trial was limited to services as a housekeeper. The defense was that she had been paid. The only evidence permitted to go to the jury in support of such defense was the evidence of alleged statements of the deceased, made in the presence of defendant in error, to

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the effect that the defendant in error had been paid. The statements were denied by the defendant in error and we do not think that the jury erred in not accepting them as sufficient evidence of payment.

The court permitted to go to the jury evidence of declarations of the deceased, shortly prior to her death, as to her intentions in leaving a portion of her property to defendant in error. Such evidence was foreign to the matter of inquiry and should not have been admitted; but we do not think it so seriously prejudiced the defense as to call for a reversal of the judgment. The court did not err in refusing to admit in evidence a book account kept by deceased showing amount of cash paid to defendant in error. There was no proof whatever that the book in which the account was kept was a book of original entries or that the entries were made in the usual course of business. Such proof is required as preliminary to the introduction of a book account. *Starr & Curtis' Annotated Statutes*, Sec. 3, Chap. 51; *Ruggles v. Gatton*, 50 Ill. 412; *Treadway v. Treadway*, 5 Ill. App. 478; *Meeth v. Rankin Brick Co.*, 48 Ill. App. 602; *McAmore v. Wiley*, 49 Ill. App. 615.

No substantial error appearing in the record, the judgment will be affirmed.

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A. T. Wellman v. W. R. Highland, Adm., etc.

1. **PROMISSORY NOTES—Possession.**—The fact that the possession of the note, indorsed by the payee, is *prima facie* evidence of ownership, may be conceded as a proposition of elementary law.

**Citation in Probate.**—Appeal from the Circuit Court of Coles County; the Hon. FRANK K. DUNN, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

JAMES W. & EDWARD C. CRAIG and JOHN S. HALL, attorneys for appellant.

S. S. ANDERSON and NEAL & WILEY, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee caused a citation to issue from the County Court against appellant and E. E. Freeborn, under the provision of section 81 of the act in regard to the administration of estates, based upon the statement they had in possession certain notes belonging to the estate of Lloyd Harris, deceased. In obedience to the writ appellant appeared before the County Court and was there examined on oath, and the court also heard the testimony of the administrator and other evidence offered, and then ordered the notes to be delivered to appellee as the property of the estate of Lloyd Harris, deceased, from which appellant appealed to the Circuit Court, where, upon a like hearing, except that appellant did not personally appear, a similar order was made, from which appellant prosecutes this further appeal, and to effect a reversal of the order insists that the finding and judgment is against the law and the evidence of the case.

Appellee first contends in this court that because appellant did not appear in the Circuit Court and submit to an examination under oath, that therefore he is guilty of contempt of that court. We do not concur in this view. If appellee desired to examine appellant under oath he should have taken the necessary preliminary steps to secure his attendance, and nothing appears in the record of this nature. Appellant was not bound to voluntarily offer himself as a witness in his own behalf, and appellee was at liberty to call him if he so desired. Appellant had already obeyed the citation of the County Court, and the order of that court had been respected by surrendering the notes in controversy to appellee. Until further commands were put upon him, appellant had discharged all his obligations either to the law or the court, and could not therefore be in contempt.

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Upon the hearing of the case it appeared from the evidence that Freeborn, as the collecting agent of appellant, had in possession certain notes in which the deceased, Lloyd Harris, was payee, and which appeared to be indorsed in the name of Harris in the handwriting of Hodges, and witnessed by Rimerman.

It is contended by appellant that the possession of the note, indorsed by Harris, is *prima facie* evidence of ownership, and it may, we think, be conceded that the proposition contains elementary law. In truth, it may be admitted that the rules of law applicable to the issues in the case are all of an elementary nature, and that the burden of proof was upon appellee to show the notes were the property of the estate, either legally or equitably. The question in the case is one of fact, to be determined by the evidence. The evidence has been discussed by counsel for appellant with much earnestness, and it is claimed that the finding of the trial court can not be supported without disregarding the evidence. The principal question for determination is what the evidence proves, and that is to be done regardless of the side producing it. On the trial appellee proved that the indorsements upon the notes were not in the handwriting of Harris; that the notes had been in possession of Harris before he died, and that he could write. Appellant called Rimerman and Hodges as witnesses and the former testified that he saw Harris for the first time at Mattoon and talked with him about trading St. Louis land or lots in which witness and appellant were interested together, but owing to the worn condition of the notes declined to trade, but that witness perhaps could get appellant to trade for them; that he went with Harris to appellant's office and there a deed was made by Wellman to Harris for four or five lots in Diamond Park, St. Louis, in which he, the witness, had no interest, and delivered same to Harris, and the latter being in a bad condition physically, could not write, and got Hodges, who was present, to sign his name on the back of the notes. He saw Harris hand the notes to Wellman and Wellman hand the deed to Harris. The deed was

acknowledged by Craig, who came up to the office. Witness admits that Harris had been drinking. Hodges testified that he met Harris for the first time in Mattoon and went with him to appellant's office and wrote his name on the notes; that appellant then handed Harris a large envelope, and something was said about it being a deed, but he saw no deed; none was written there, and he did not see Craig in the office. Appellee proved on the trial that appellant in his testimony in the County Court stated that he did not remember whether or not he made a deed to Harris; that he did not remember who made the deed or who took the acknowledgment of the deed; that he did not remember how many lots he conveyed, two or four; that Rimerman was a partner in the lots and in the trade, and the notes in question were all that he received for his share. Craig testified that at his own office he took the acknowledgment of Wellman and wife to a paper of some kind, the nature of which he did not know. It appears further from the evidence that within a few days after this Harris died, and that no deed was found among his papers or effects, nor had such deed been seen after Harris left the office of Wellman.

From the evidence we have recited, together with all the other evidence in the record, and the inferences to be naturally drawn from it, we feel warranted in the conclusion that the trial court, who saw and heard the witnesses, was justified in finding that no deed or other consideration was given for the assignment of the notes; that Harris was either drunk or under some other mental disability at the time he was in appellant's office, and when it is claimed he assigned the notes, and the indorsements upon the notes were not such acts of Harris as were legally binding upon him. The testimony of Rimerman and Hodges was conflicting upon material points, strongly affecting their credibility, and the statement of appellant in the County Court was inconsistent in vital points with the testimony of the other witnesses. If appellant in fact executed and delivered the deed to Harris, it is unreasonable to believe



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he did not remember it, and the natural inference from such statement is that he did not deliver such deed, and such inference becomes nearly conclusive when we find it is corroborated by the fact that no deed had been seen, or found among the effects of deceased, and no one claims to have seen it at any time but Rimerman, who is contradicted by Hodges when he says that an envelope only, said to contain a deed, was delivered to Harris. Rimerman was also mistaken as to the fact that Craig acknowledged the deed in Wellman's office, and it is a safe conclusion he never saw the deed. We are satisfied the trial court reached the proper conclusion as to the facts, and its judgment will be affirmed. Order affirmed.

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**A. S. Clark v. Lowell A. Smith.**

1. EVIDENCE—*Conversations Between Litigants—Admissions.*—Admissions or statements made by a party concerning the matter in dispute are always admissible, even though made after suit commenced.

2. STATUTE OF FRAUDS—*Original Undertaking to Pay for Goods Sold.*—Where a person tells a merchant to sell goods to his tenant and promises that he will pay for them, it is an original undertaking by him to pay for the goods and it is not necessary for the promise to be in writing.

3. INSTRUCTIONS—*Invading the Province of the Jury.*—An instruction which tells the jury that the charging of goods against the person who told the merchant to so charge them is a strong circumstance showing the undertaking of such person to be merely a collateral promise and void under the statute of frauds, is erroneous as invading the province of the jury.

4. SAME—*Whether There Was an Original Undertaking.*—An instruction which tells the jury that unless they find from the evidence that a good and valid consideration passed from the plaintiff to the defendant, and that the defendant signed and sealed a promise, agreement, memorandum or note in writing charging himself with the debt, they should find for him, is erroneous, as taking from the jury the consideration of the question whether there was an original undertaking on the part of the defendant to pay for the goods.

**Assumpsit, for goods sold.** Appeal from the County Court of Moultrie County; the Hon. JOHN D. PURVIS, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

E. J. MILLER, attorney for appellant.

EWING & BALDWIN, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellant, a retail merchant, brought suit against appellee and Elmer Broomgart to recover for family supplies furnished Broomgart. Before the trial in the County Court, the suit was dismissed as to Broomgart. A trial by jury resulted in a verdict and judgment for appellee.

Broomgart was a tenant of appellee. Appellant testified that appellee told him to furnish the goods to Broomgart and promised that he (appellee) would pay for them. Appellee denied such promise and testified that he only said to appellant that Broomgart was all right. The court refused to admit evidence of conversations had between the parties and statements made by appellee, after the goods were furnished, relative to the alleged promise. In this the court erred. Admissions or statements made by a party concerning the matter in dispute are always admissible, even though made after suit commenced.

If the contention of fact made by appellant is true, then there was an original undertaking by appellee to pay for the goods and it was not necessary for the promise to be in writing. Eddy et al. v. Roberts, 17 Ill. 505; Geary v. O'Neil, 73 Ill. 593; Hartley v. Varner, 88 Ill. 561; Resseter v. Waterman, 151 Ill. 169.

The fourth instruction given for appellee told the jury that charging of goods against Broomgart and originally joining him in the suit with appellee was "a strong circumstance showing that the undertaking of Smith was merely a collateral contract and void under the statute." It clearly invaded the province of the jury and was erroneous for that reason.

The ninth instruction given for appellee told the jury that unless they found from the evidence that a good and valid consideration passed from the plaintiff to the defendant, and that Smith signed and sealed a promise, agreement,

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memorandum or note in writing charging himself with the debt, they should find for him.

This instruction took from the jury the consideration of whether there was an original undertaking on the part of Smith to pay for the goods.

Because of these two erroneous instructions and the error of the court in refusing to admit in evidence conversations had between the parties and statements made by appellee after the goods were furnished, the judgment must be reversed and the cause remanded.

Reversed and remanded.

George A. Stadler v. Michael Fahey.

1. FEES AND SALARIES—*Of Municipal Officers—Not to be Increased nor Diminished During their Term of Office.*—It is provided by section 11, article 9, of our State constitution that, "The fees, salary or compensation of municipal officers, who are elected or appointed for a definite term, can not be increased or diminished during such term."

2. ORDINANCES—*When Courts Will Not go Outside of Them to Find Intention.*—Where the language of an ordinance is clear and admits of no ambiguity, courts will not go outside of it to find the intention of its enactors.

3. ESTOPPEL—*By Member of City Council to Assert Illegality of Ordinance for Which he Voted, When.*—A council member's vote on the final passage of an ordinance does not estop him from asserting its illegality as a taxpayer and a citizen.

**Bill for an Injunction.**—Appeal from the Circuit Court of Cook County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

**Statement.**—The city of Decatur, Illinois, is a municipal corporation under the general incorporation act relating to cities and villages. On the 19th of April, 1899, appellant was elected mayor of the city for a term of two years.

The salary of the mayor at that time was \$500 per annum, as fixed by an ordinance passed in May, 1898. By an ordi-

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nance, approved May 27, 1899, his salary was raised to \$1,500 per annum, payable in monthly installments of \$125 each. After he had drawn \$125 for each of the months of May, June, July and August, aggregating \$500, appellee, a resident taxpayer of the city, presented to the Circuit Court a bill in chancery to restrain any further payment to appellant as salary for that year. Appellant, the city comptroller, the city treasurer and the municipality were made defendants. The theory of the bill is that the ordinance of May, 1898, fixed the salary of appellant, and that the city council had no right to raise it during his term of office.

The position was controverted in the court below, and it was also contended that the complainant (appellee) was estopped from asserting the illegality of the ordinance, for the reason that he was a member of the city council at the time the ordinance was adopted and voted for it. The Circuit Court sustained the bill, and permanently enjoined the payment of any further salary to appellant for that year.

W. C. JOHNS, attorney for appellant.

The constitution of 1870, Art. IX, Sec. 11, p. 69, provides :

"The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term."

HUGH CREA, attorney for appellee.

If the language of a statute or ordinance is clear and admits of but one meaning there is no room for construction. It is not allowable to interpret that which has no need of interpretation. In such a case any departure from the language used would be an unjustifiable assumption of legislative power. 23 Am. & En. Ency. of Law, 298; Frye v. Chicago R. R. Co., 73 Ill. 399; Martin v. Swift, 120 Ill. 489; Beardstown v. Virginia, 76 Ill. 34.

It is only in cases where the words of a statute are capable of two meanings, or where by giving them their literal interpretation the statute would be inconsistent or ambigu-

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uous, that courts resort to the secondary rules of construction to aid in determining the real intention of the legislature. 23 Am. & Eng. Ency. of Law, 305.

MR. JUSTICE HARKER delivered the opinion of the court.

It is provided by section 11, article 9 of our State constitution :

"The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term."

Section 13, article 6 of chapter 24, Revised Statutes, provides :

"The mayor of any city shall receive such compensation as the city council may by ordinance direct, but his compensation shall not be changed during his term of office."

We are clearly of the opinion that appellant's salary at the time he was elected and installed into office was fixed by the ordinance of May 24, 1898.

The first section of it is as follows: "The salary of the mayor shall be \$500 per annum." It is contended that it applies only to that year. But no such limitation appears anywhere in the ordinance. There is nothing uncertain about the language quoted. It declares plainly that the mayor's salary shall be \$500 per annum, not for one year merely, but indefinitely. The clear meaning is that \$500 each year shall be paid to that official until a change in amount shall be legally provided for by ordinance. The attempted change was not made until after appellant had entered upon his term of office and was, therefore, in direct violation of the constitutional and statutory provisions above quoted.

Counsel for appellant would have us read into the section of the ordinance of 1898 relating to the mayor's salary, the words "for the fiscal year, 1898," because it was but a re-enactment of the same provision contained in ordinances passed in 1893, 1894, 1895, 1896 and 1897.

It is argued that an intention of the city council that such ordinance should be only temporary is manifested by its annual adoption.

Where the language of an ordinance is clear and admits of no ambiguity, courts will not go outside of it to find the intention of its enactors. *Frye et al. v. C. B. & Q. R. R. Co.*, 73 Ill. 399; *Beardstown et al. v. Virginia et al.*, 76 Ill. 34; *Martin et al. v. Swift*, 120 Ill. 488.

It is contended that appellee is estopped from asserting the illegality of the ordinance, because of the action taken by him with reference to it while he was a member of the city council.

It appears from the record that appellee was a member of the city council and a member of the salary committee. At the meeting of the council on May 22, 1899, a majority of the committee reported to the council in favor of raising the mayor's salary to \$1,500. Appellee was in favor of the salaries remaining as fixed by the ordinance of 1898, and submitted a minority report to that effect. There was opposition to raising the salaries of some of the officers, as recommended by the majority of the committee, and a motion to adopt the majority report was lost. A motion was then made to adopt the majority report in reference to the mayor's salary and that the salaries of the other officers remain the same as that provided by the ordinance of 1898. That motion was carried by a vote of twelve to two. Appellee voted in the negative. The ordinance as revised was then put upon its final passage and all voted for it.

We do not think appellee's vote on the final passage of the ordinance estops him from asserting its illegality as a taxpayer and a citizen. As a member of the city council his attitude toward raising the salaries of officials was hostile until after it had been decided by a large majority vote to raise the salary of the mayor. He opposed and protested to the point where opposition and protest could no longer serve any purpose. To vote against the ordinance, as revised, could no longer avail anything, and would put him on record as being against continuing the salaries of other officers as fixed by the ordinance of 1898, a proposition he was in favor of.

The decree of the Circuit Court will be affirmed.

**Wilson M. Duggans et al. v. Covenant Mutual Life Ass'n.**

1. **FORMER DECISIONS—*Followed, etc.***—This case in every essential particular, both of fact and principle, is like the case of *Rowell v. The Covenant Mutual Life Association*, 84 Ill. App. 304, and the views there expressed are adhered to.

2. **BENEFICIARY ASSOCIATIONS—*Not Permitted to Create Estoppels Against Members.***—A beneficiary association can not be permitted to take an advantage of its own wrong so as to create an estoppel against its members, and the fact that it is acting as the trustee of its policy holders puts it in no different attitude.

3. **ESTOPPELS—*When They Arise.***—An estoppel can only arise when the conduct of the party is fraudulent in its purpose or unjust in its results; or, where one party willfully causes another to alter his previous position such party is concluded from averring against the other a different state of things.

**Bill to Prevent a Forfeiture of an Insurance Contract.**—Trial in the Circuit Court of McLean County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Decree dismissing the bill; error by complainant. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

ABNER G. MURRAY, attorney for plaintiffs in error.

T. A. MORAN, G. W. WALL and W. C. CALKINS, attorneys for defendant in error.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was a bill in equity filed by plaintiffs in error to prevent forfeitures of their certificates of insurance and to enforce a specific performance of their contracts made with defendant according to the terms thereof. Upon the hearing the court dismissed the bill for want of equity, and to reverse that decree this writ of error is prosecuted.

The case, in every essential particular, both of fact and principle, is like the case of *Rowell v. Covenant Mutual Life Association*, 84 Ill. App. 304, and we adhere to the views then expressed and consider it unnecessary to repeat

the statement or the reasoning of the court by which the conclusion was there reached. In the Rowell case the questions arose by demurrer to the bill, while in this, answer was filed and the evidence heard, upon which the question of estoppel against complainants by reason of the continued payment of assessments under different plans and amounts, other than prescribed by the contract, arises with much greater force than did the same question upon the demurrer to the bill in the Rowell case. Upon a consideration of the facts established by the evidence, the successive gradations of increased assessments, the different plans by which they were created until the call No. 149 was reached, most excessive of all the rest, and to which complainants objected, and the further fact that the use of proxies in the votes of the association by which these assessments were authorized or ratified, were not obtained for such use, we are not disposed to hold there was such acquiescence or participation in such acts of the association as to create an estoppel, or from which a waiver could be inferred of the terms of the original contract. We can not conceive, as argued by defendant, that new members were in any manner induced to join the association because of these continued payments; and that any of them had specific knowledge concerning the facts is speculative and imaginary.

In a recent case decided in the Appellate Court of the Second District, *Covenant Mutual Life Association v. Tuttle*, 87 Ill. App. 309, Mr. Presiding Justice Crabtree, after quoting the definitions of estoppels to the effect that they only arise when the conduct of the party estopped is fraudulent in its purpose, or unjust in its results, or, where one willfully causes another to alter his previous position, the former is concluded from averring against the latter a different state of things, said :

"It certainly can not be said that Tuttle, in paying previous illegal assessments, acted fraudulently, or that he willfully did anything calculated to mislead others to their injury. When he paid illegal assessments, he did so under a moral compulsion, and the threat, implied at least, that if he did not pay, his certificate would be forfeited, and the provision



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Duggans v. Covenant Mutual Life Ass'n.

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made for his wife in the event of his death be thereby lost. Did this conduct on his part warrant appellant in increasing Tuttle's assessment tenfold? In other words, can appellant thus be permitted to take advantage of its own wrong?"

In *Farmers Fire Ins. Co. v. Knight*, 162 Ill. 470, the court declared it was aware of no principle which would preclude a policy holder from calling in question the validity of an assessment, although he may have previously paid assessments which did not conform to law, and that the doctrine of estoppel does not apply to such a case. We think such doctrine wholly inapplicable to the facts of this case. We find nothing in the by-laws of the association, as they existed when the contract was made, as insisted by defendant, permitting a change of such contract, nor can the act of June 22, 1898, be given a retroactive effect, and can not, therefore, in any manner impair pre-existing contracts, as would seem to be implied from the argument before us. *Moore v. Guaranty Fund Life Ass'n*, 178 Ill. 202; *Voight v. Kersten*, 164 Ill. 314.

It is also urged as a reason against the specific performance of the contract as made, that the original plan of *post mortem* assessments adopted by the society have proved a failure and that the association would become bankrupt if it continued upon the original plan. This point stands upon a faulty construction of the contract, and assumes the association was thereby bound to pay a specified sum of money, absolutely and at all events, when in truth it is only bound to levy an assessment upon its members, and pay to the beneficiary such amount as would thereby be produced, not exceeding the sum named in the certificate. The contract is valid and binding, and susceptible of enforcement to the extent of the benefits that it will actually produce.

Upon the authority of *Rowell v. Covenant Mutual Life Association*, *supra*, the decree of the Circuit Court will be reversed and the cause remanded, with directions to that court to enter a decree in conformity to the prayer of the bill. Reversed and remanded.

**J. Q. Geiman et al. v. The Town of Browning.**

1. *RES ADJUDICATA*—*Former Appeals*.—When the questions presented on a second appeal of the same case are identical with those adjudicated when the case was formerly before us, the law of the case as announced in the former appeal, controls.

Debt, on an appeal bond. Appeal from the Circuit Court of Schuyler County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

L. A. JARMAN, attorney for appellants.

GLASS & BOTTENBERG, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This case was before this court at the May term, 1898, when the judgment of the Circuit Court in favor of the appellants was reversed and the cause remanded. (79 Ill. App. 337.)

The case was subsequently redocketed in the Circuit Court, and a new trial there had upon an agreed state of facts, the same as those shown by the record when the case was formerly before us, and a judgment was rendered for appellee in conformity with the opinion of this court.

The appellants now bring the case to this court by appeal, and urge us to reverse that judgment. The questions now presented are identical with those adjudicated when the case was formerly before us, and the law of the case as then announced controls us now, so far as this case is concerned.

We therefore affirm the judgment appealed from.

Benjamin W. Taylor, Estelle F. Taylor and William R. 87 419  
 Proctor v. Elizabeth Richman. 106 81

1. *PRACTICE—Judgments in Excess of the Ad Damnum.*—It is reversible error to enter judgment for a greater amount than is claimed by the plaintiff in his declaration.

2. *SAME—Recovery for Interest Not Due at the Commencement of Suit.*—A party can not recover for money not due at the time of instituting suit.

*Assumpsit.*—Error to the Circuit Court of Mason County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

BEACH & HODNETT, attorneys for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE HARKER delivered the opinion of the court.

At the February term, 1897, of the Circuit Court of Mason County, the defendant in error brought suit against the plaintiffs in error to recover interest due on a promissory note for \$2,524, dated May 14, 1894, and due in six years. The note bore interest at the rate of seven per cent, payable annually, and at the time suit was brought there was two years' interest due, amounting to \$353.36. The damages were laid in the declaration at \$500. The case was continued for service on defendants not served until the August term, 1897, at which time another year's interest had become due. No pleas being filed, judgment by default was entered against the plaintiffs in error for \$568.76, being for three years' interest, and \$68.76 in excess of the *ad damnum* in the declaration.

The judgment is erroneous, for two reasons: It exceeds the *ad damnum* in the declaration. It is reversible error to enter judgment for a greater amount than is claimed in the plaintiffs' declaration. *Hichins v. Lyon*, 35 Ill. 150;

Altes v. Hinckler et al., 36 Ill. 275; Kelly v. National Bank, etc., 64 Ill. 541.

It includes a year's interest that was not due at the time suit was commenced. It is well settled that a party can not recover for money not due at the time of instituting suit.

The judgment will be reversed and the cause remanded.

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### Chicago & E. I. R. R. Co. v. Felix McElhaney.

1. NEGLIGENCE—*Bar to Recovery*.—Where a plaintiff's conduct has been so reckless that the minds of all fair-minded persons must conclude that he was acting unreasonably in trying to cross a railroad track before a train, he can not recover.

**Action in Case**, for personal injuries. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1899. Reversed. Opinion filed February 27, 1900.

H. M. STEELY, attorney for appellant; W. H. LYFORD, of counsel.

MABIN & CLARK, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case by appellee against appellant, tried by jury in the Circuit Court of Vermilion County, where a verdict and judgment were rendered in favor of appellee for \$297.92 damages. Appellant brings the case to this court by appeal and urges us to reverse the judgment on the ground, among others, that the court erroneously refused to direct a verdict for it at the close of all the evidence, as requested by counsel for appellant, accompanied with a written instruction to that effect at that time presented. The declaration claimed damages for negligence on the part of the servants of appellant in running its passenger train over a crossing on a public high-

way in the corporate limits of the village of Alvin in this State; by reason of which appellee was personally injured, and his wagon, harness and two horses damaged on the crossing while passing over it, and he in the exercise of due care for his own safety. The negligence claimed in the first count was a failure to give the statutory signals before reaching and while passing over the crossing; in the second count, running the train at a rate of speed in excess of that limited by an ordinance of the village; in the third count, running the train at a high and dangerous rate of speed over the crossing greatly in excess of that limited by the ordinance of the village then in force, and willfully, wantonly and recklessly injuring appellee, his wagon, harness and horses, while rightfully on the crossing.

Appellant pleaded not guilty; and the evidence shows that appellant's railroad runs north and south through the village, and crosses a public highway therein which runs east and west.

Appellee is a teamster by occupation, and lives in Alvin, on the highway in question, about 250 feet east of this crossing. On the day of the accident appellant took his team and the running gears of his wagon to the woods east of the village and got a load of firewood for one Collins, who also lived on the highway in question, just across on the west side of the railroad, and he went along with appellee to get the wood, which was cut in lengths of from twelve to fourteen feet. The wood was piled onto the running gears of the wagon, and the two started with the wagon and team to take the wood to Collins' home. Their route being on this highway, and they being east of the railroad, must cross over the railroad at the crossing, 250 feet west of appellee's home. Appellee sat on the front end of the load of wood with his back toward the north, driving the team, and Collins sat close behind him. When they got within about 100 feet of the crossing they heard the fast passenger train of appellant coming from the north blow the whistle, and also heard the roar and noise of the approaching train; appellee did not turn to look where

it was, but drove ahead. When reaching a point about seventeen feet of the east rail of the track on the crossing, however, appellee and Collins each saw that the train was coming toward the crossing at the rate of from twenty to thirty miles an hour, and was not far away. Collins then said to appellee, "Here comes the infernal fast train; stop!" to which appellee replied, "I can very easily make it across;" and then slapped his horses with the lines and urged them on over the crossing at a faster gait. Collins, observing that he did not stop as he advised him, again told him to "stop," and seeing he would not, jumped off onto the ground before the wagon reached the east rail, and turning away with his back toward the west, said "Good-bye, McElhaney."

The fireman and engineer on the locomotive of the approaching train, seeing appellee urging his team over the crossing ahead of them, gave the danger signals, applied the steam brake, and did all in their power to avoid a collision; and by appellee's urging his team, and the engineer's promptness in trying to stop the train, appellee succeeded in getting over the tracks with his team and wagon, but the locomotive struck the ends of the protruding wood that stuck over the hind end of the wagon, which turned the wagon over, dumping appellee on the ground, and injuring the wagon and harness, but not injuring the horses. Appellee claims to have received some injuries, but not of a very pronounced character. There is some conflict in the evidence as to whether or not the bell on the locomotive was ringing as the train approached the crossing, but the weight of the evidence seems to us to show that it was being rung by an automatic arrangement.

The village of Alvin had an ordinance in force when the accident occurred, and before then, which made it unlawful for trains of cars to be run through its corporate limits faster than ten miles per hour, but this fast passenger train had always disregarded it by running from twenty to thirty miles an hour when it passed through, as it did on the afternoon of the accident. Appellee was well aware of the running of this train and fully acquainted with the crossing,

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C. & E. I. R. R. Co. v. McElhanev.

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having done lots of hauling over it. Under the facts thus stated, which are not contradicted in the main, we are forced to conclude that appellee was not in the exercise of ordinary care when going over the crossing, but in so doing acted in a reckless manner, in view of his seeing the train, how near it was to the crossing, the rate of speed it was traveling, and he with a heavy load of long wood, which had to be pulled over the railroad tracks. In fact his conduct was so reckless that the minds of all fair-minded persons must conclude that he was acting unreasonably in trying to cross before the train went by; and all fair-minded persons would likewise conclude that the servants of defendant in charge of the train, by their conduct, did not willfully, wantonly or recklessly drive the train so as to intentionally injure him as he passed over the crossing, because of blowing the whistle for the crossing, giving the danger signal, applying the brakes to the train, and using all the appliances at their command to stop the train as soon as they saw that appellee was determined to go over. In fact appellee's reckless determination to beat the train over the crossing was the efficient cause of his being injured and his property damaged, rather than the negligence of the servants of appellant in running the train through the village at a speed of twenty to thirty miles an hour, which was in excess of that allowed by the ordinance; hence the verdict in his favor in this case ought not to have been allowed to stand by the trial court, who should have given the instruction directing a verdict for appellant as requested by its counsel. See *W., St. L. & P. Ry. Co. v. Hicks*, 13 Ill. App. 407; *Same v. Weisbeck*, 14 Ill. App. 525; *C. & A. R. R. Co. v. Stewart*, 71 Ill. App. 647; *Simmons v. C. T. R. R. Co.*, 110 Ill. 340; *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132; and *C. & P. S. Ry. Co. v. Meixner*, 160 Ill. 320.

Believing, as we do, from the evidence, that under the facts in this case, appellee did not show a right to recover in this action, the court committed reversible error when it refused to direct a verdict for the appellant as requested

by its counsel, and therefore we reverse the judgment. Judgment reversed.

**Finding of Facts.**—The clerk, in making up the judgment in this case, will insert the following finding of facts:

The court finds from the evidence that appellee was not exercising due care for his safety at the time in question, nor did the servants of appellant in charge of the locomotive in question, run the same so recklessly or wantonly as claimed by him, nor did they willfully, wantonly or unlawfully cause the injuries to appellant or his property as charged in his declaration.

87	424
91	238
87	424
894	90
895	665

### Kellyville Coal Co. v. James Hill.

1. MINES AND MINERS—*Willful Failure to Have the Mine Examined.*—If the operator of a coal mine employs an examiner holding a certificate from the State Board of Examiners authorizing him to act as such, and the examination of the mine is made at the time required by law, it will constitute a compliance, so far as the operator is concerned, with the provisions of Section 4, Chapter 98, 2d Starr & Curtis' Annotated Statutes, 2719.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1890. Reversed and remanded. Opinion filed February 27, 1900.

D. D. EVANS and G. M. McDOWELL, attorneys for appellant.

MABIN & CLARK, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court. Appellee brought suit to recover damages for injuries caused by the falling of a large loose rock upon him from the roof of appellant's coal mine where he was working. The negligence charged in the declaration was a willful failure to have the mine examined by a duly authorized agent



to determine whether there were any dangerous conditions therein, as required by Section 4, Chapter 93, 2d Starr & Curtis' Annotated Statutes, 2719, and willfully permitting appellee to enter the mine before the conditions were reported.

A trial was had upon a plea of general issue, which resulted in a verdict and judgment in favor of appellee for \$5,000.

The chief contention on which a reversal of the judgment is urged is that appellee failed to prove a willful failure to comply with the statute. James Maggs, the mine examiner, testified that on the morning of the day on which appellee was injured he made an examination of the mine; that he made a thorough inspection of the entry where appellee was injured, testing the roof with a sounding rod; that he found there a loose rock, which he marked; that he found nothing wrong elsewhere in the entry, and that he delivered a report of his examination to the cager at the foot of the shaft at seven o'clock in the morning. He further testified that later, about 8:30 o'clock that morning (shortly before appellee was injured) while passing through the mine to take up timber orders, he again sounded the roof where appellee was working and found nothing wrong.

If the testimony of Maggs is true, there was no such violation of the statute as is charged in the declaration. No witness denied that he made an examination of the mine at the time testified to by him. None denied that he made an inspection and sounding of the particular entry where appellee met his injury a few hours afterward.

It is contended that his testimony is untrue, because a witness named William Youhoe testified that on the day before the accident he examined the roof at the point of the accident and found a large loose rock, which was the one that fell on appellee. It does not necessarily follow that because Youhoe discovered the loose rock the day before that Maggs made no inspection of the entry.

In testing the roof of a mine with a rod, the inspector must determine from the sound whether any part of it is

loose and dangerous. If it sounds firm and solid, he determines that it is safe; if it sounds hollow, he determines that it is loose, and marks it. If his hearing is not sufficiently acute to detect a loose place, which afterward falls and causes injury, the operator certainly should not be held liable upon the ground that he had willfully failed to comply with the statute. The statute does not provide how nor to what extent the examination shall be made. If the operator employs an examiner, holding a certificate authorizing him to act as such, and the examination is made at the time required, that, in our opinion, would constitute a compliance so far as the operator is concerned. At all events, a mere mistake of the examiner or a failure on his part to detect a defective place in the roof should not constitute a willful neglect of the operators within the meaning of the statute.

Maggs is corroborated by the witness James Courtney, a miner who was working with appellee as a partner. Courtney testified that he saw the chalk mark which had been made by Maggs on the loose rock as soon as he entered the room, and that it was not there the night before. He also made an examination of the roof on his own account, and finding the chalked place, pulled it down.

The verdict of the jury can be justified upon no other theory than that Maggs swore falsely upon the subject of making an examination. A careful examination of the evidence in the record has satisfied us that he did make it. He held a certificate of competency from the State Board of Examiners and, as already intimated, appellant performed the statutory requirement when it had the examination made by him. With this view, we feel that the verdict is unjust and the court below should have granted a new trial.

The judgment will be reversed and the cause remanded.

**George P. Chapman v. Chauncey L. Chapman.**

1. **PRESUMPTIONS—*Gratuitous Services.***—Where a merchant received his brother in his home as a visitor, and boarded and lodged him as a member of the family, and he performed various kinds of service in and about his brother's store and buildings, such as waiting on customers, etc., in the absence of an express agreement the law will indulge the presumption that what was done for each other by these two brothers was done gratuitously, and as the promptings of natural affection.

**Assumpsit**, for services. Appeal from the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

J. R. & WALTER EDEN, attorneys for appellant.

HARBAUGH & WHITAKER, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

The parties to this suit are brothers. Appellant is a hardware merchant at Sullivan, Illinois. Appellee is a resident of Dunlap, Iowa. Appellee visited his brother at Sullivan in February, 1898, and remained with him ten or eleven months. During his stay he performed various kinds of service in and about his brother's store and buildings, such as waiting on customers, marking goods, sweeping out, painting, etc. To recover therefor this suit was brought. It was defended upon the ground that the service was performed voluntarily and without intention to charge for the same, while appellee was a mere visitor at the house of appellant. There was a recovery for \$208 in favor of appellee. If appellee was received in the home of appellant as a visitor and was there lodged and boarded as a member of the family, there could be no presumption that he intended to charge for what he did or be charged for what he received. In the absence of express agreement, the law, on the contrary, would indulge the presumption that what was done for each other by these two brothers

was done gratuitously, and as the promptings of natural affection. *Miller v. Miller*, 16 Ill. 296; *Brush v. Blanchard*, 18 Ill. 46; *Faloon v. McIntire et al.*, 118 Ill. 292; *Collar v. Patterson*, 137 Ill. 403.

The first, second and third instructions for the plaintiff, in the light of the above cited authorities, are erroneous. One tells the jury that if the service performed was worth more than the board and lodging received, the plaintiff was entitled to recover the difference. The others allow a recovery in the absence of an express agreement if service was performed by the plaintiff at the request of the defendant.

For the error of the court in giving those instructions, the judgment will be reversed and the cause remanded.

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### John C. Wilson v. William E. Hughes.

1. RES ADJUDICATA—*Former Appeals in the Same Case.*—Matters decided in the first appeal will not be reconsidered on a second appeal of the same case.

**Partition.**—Appeal from the Circuit Court of Greene County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

JOHN C. WILSON, attorney *pro se*; GRANT FOREMAN and WILLIAM H. SLACK, of counsel.

WILLIAM WARD HUGHES, solicitor for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This case was before us at a former term, and is reported as "*William H. Slack et al. v. William E. Hughes.*" (71 Ill. App. 91.) We then reversed the order that had theretofore been made therein by the Circuit Court, and remanded the case to that court with directions to refer "the matter to the master and take and report proof as to the amount actually due to Hughes, and upon its ascertainment, that it

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Shirey v. Bicknell.

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be decreed to be paid to him and the excess, if any, to appellants (Slack & Foreman) to the amount of their claim, as shown, and the residue, if any, to Wilson."

The Circuit Court having referred the matter to the master as directed, he took and reported the evidence offered by appellee and appellant (Slack & Foreman offering none), and from the evidence reported by the master the court found there was due Hughes from Wilson, which was embraced in the order in question, the sum of \$650.15, and ordered the master to pay Hughes out of the fund in question, first the costs herein and then said sum of \$650.15, so far as said fund will discharge the same.

The appellant Wilson, seeks now to reverse that order, because among other things he insists that the amount found to be due from him to Hughes is excessive, as is shown by the evidence.

We have carefully examined the evidence and are of the opinion that the same supports and warrants the finding and order.

The other errors assigned and urged to reverse the order appealed from, were all involved in the adjudication made by this court when this case was formerly before us, and for that reason will not be again considered by us. The record being free from reversible error, we affirm the order appealed from. Order affirmed.

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W. S. Shirey v. Julius Bicknell.

1. SUBROGATION—*Chancery Jurisdiction*.—In the matter of subrogation a court of equity has original jurisdiction, even though a remedy exists at law; and under the facts in this case, the law affords no adequate remedy.

2. EQUITY PRACTICE—*Filing Cross-bills—Harmless Error*.—Under our statute, after answer, a defendant has the right to file a cross-bill without leave of court being first obtained; but where such leave is refused by the court and the decree gives the defendant all the relief that he could have obtained under a cross-bill, he is not prejudiced by such refusal, and it is not reversible error.

**Bill for Subrogation and Contribution.**—Appeal from the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

HARBAUGH & WHITAKER, attorneys for appellant.

JOHN R. EDEN, attorney for appellee.

MR. JUSTICE BURREGHS delivered the opinion of the court.

This was a proceeding in equity by appellee against appellant and others for subrogation and contribution. Answers were filed and the evidence taken before the master and reported to the court. A supplemental bill was also filed. Upon the hearing, the court decreed for appellee, subrogating him to the rights of the Millikin National Bank, as judgment and execution creditor in the property of appellant; from which the latter appealed to this court and seeks to reverse that decree, insisting chiefly that the remedy of appellee is at law; that appellee was surety for J. S. Bicknell only; and that the court refused appellant leave to file a cross-bill.

The evidence shows that the firm of Riggin, Shirey & Co. (the "Co." being J. S. Bicknell), borrowed \$6,000 from the Millikin National Bank of Decatur, Illinois, and gave their note therefor, with appellee, Julius B. and C. T. Atchinson as sureties thereon. This note was afterward renewed for the same amount, and with the same parties thereto, and not being paid in full, judgment was recovered thereon in the Moultrie County Circuit Court for \$2,954.15, and an execution issued thereon. Shirey, one of the firm, owned real estate and personal property, and after the execution was issued, said real estate and personal property was mortgaged to one W. T. Shade, for \$4,308, the real estate being already incumbered for \$10,000. The firm of Riggin, Shirey & Company was insolvent. The bank refused to have the execution levied upon the property of Shirey, and insisted upon its being levied upon the property of appellee (Julius Bicknell), to prevent which, he

presented the original bill in this case to the master and obtained an injunction which, on motion, was afterward dissolved and the lands of appellee were sold in satisfaction of said execution, whereupon he filed the supplemental bill, setting up such facts and praying to be subrogated to the rights of the bank as execution creditor, against the real estate and personal property of appellant.

As to appellant's contention against the decree, that appellee's remedy is at law, we think in the matter of subrogation a court of equity had original jurisdiction, even though a remedy exists at law, and under the facts in this case, the law affords no adequate remedy.

As to the second insistence of appellant, that appellee was surety only for his son, we think the evidence, when fully examined, warranted the finding of the court, that appellee was the surety of the firm of Riggins, Shirey & Company and not for his son only.

And as to the third insistence of appellant that the court improperly refused him leave to file a cross-bill, we find the record shows that appellant has not been prejudiced by such refusal, as the decree gave him all that he could have procured had he been permitted to file a cross-bill. Besides, under our statute, after answer, appellant had the right to file a cross-bill without leave of court being first obtained. According to the evidence, the \$380 which appellee realized from the proceeds of the sale of his son's lands, was to be applied upon an individual debt of the son, as had the other part of such proceeds; and we find there is no basis in the evidence for appellant's contention that such land was placed at the disposal of appellee by his son as an indemnity for going security for him; and as a condition precedent to other relief, the court properly ordered the Effingham property to be sold. Finding no reversible error in this record, the decree of the Circuit Court is affirmed.

**Z. M. Dunn v. Mary C. Trout.**

1. **MARRIAGE CONTRACT**—*Sexual Intercourse no Excuse for a Refusal to Perform.*—If a man after engaging to marry a woman has sexual intercourse with her he can not for that reason break off the engagement and take advantage of his own wrong.

**Breach of Marriage Contract.**—Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

CHARLES H. KIENZLE and THOMAS J. SMITH, attorneys for appellant.

J. L. RAY, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$500, recovered by appellee against appellant in a suit for breach of a marriage contract.

A reversal is urged because the verdict is not supported by the evidence and because the court erred in giving certain instructions for the plaintiff and in refusing others offered by the defendant. There is something said in the printed briefs about a variance between the proofs and the declaration, but as that objection is raised for the first time in this court and has but little merit in it we shall not discuss it.

The evidence shows that both parties are quite advanced in years. Appellee, a widow from Ohio, while visiting relatives and friends in Champaign county, met appellant, then a widower, early in July, 1897. A strong attachment at once sprang up between them. During her stay of six or seven weeks in Illinois, appellant frequently visited her, took her out riding and did various other acts indicating love and affection for her. She testified that during the time he made love to her and promised to marry her. When she returned to her home he accompanied her as far as



Indianapolis. She stated that when he left her he directed her to prepare for the marriage, which she did, and that he promised to come for her in a few weeks and bring her back to Illinois as his wife. He testified positively that he never promised to marry her and denied many of the statements made by her. In the conflict it was the peculiar province of the jury to say where the truth was. After she reached home she received a number of letters of a very endearing character from him. They tend strongly to corroborate her and doubtless influenced the verdict to a large extent.

Upon the trial appellant introduced testimony of illicit conduct on the part of appellee, which she denied, and which was so unreasonable in its character that we can not believe it. It was to the effect that appellant had sexual intercourse with her at times and at a place so open and easy of detection that the jury could not have believed it. It was upon that testimony that appellant asked the court to instruct the jury as follows :

"13. You are instructed that though you may believe from the evidence that the defendant did promise to marry the plaintiff, believing at the time she was a chaste and virtuous woman, yet if the defendant afterward discovered from the plaintiff's acts that she was not a virtuous woman, then, and in that event of the proof, the defendant would have a right to refuse to marry the plaintiff, and you should find your verdict for the defendant."

The court rightly refused to give the instruction. If appellant, after engaging to marry appellee, had sexual intercourse with her, he could not for that reason break off the engagement and thereby take advantage of his own wrong.

Appellant's twelfth refused instruction was fully covered by other given instructions. There is nothing seriously wrong with the instructions given for appellee.

Seeing no error in the record that would justify a reversal of the judgment, the same is hereby affirmed.

Presiding Justice WRIGHT, having presided at the trial in the court below, took no part in the decision of this case.

**Bauer Grocer Co. v. McKee Shoe Co.**

1. **JUDGMENT NOTES—Power of a Surviving Partner to Give in the Name of the Firm.**—A surviving partner has no power to give a note and power of attorney to confess judgment in the name of the firm, and a judgment confessed upon such a note and power is void as to the estate of the deceased partner, but is valid as to the partner who did execute them.

2. **SAME—Valid as to the Surviving Partner—Satisfaction.**—A judgment confessed upon a note and warrant of attorney executed by a surviving partner, although void as against the estate of the deceased partner, may still be satisfied out of the partnership assets.

3. **PARTNERS—Suits at Law Against Surviving Partners.**—Where one of two partners dies, suits at law must be against the surviving partner, and in the event of recovery satisfaction can be obtained out of the partnership property.

4. **SAME—Duty of Survivors.**—The law makes it the duty of a surviving partner to take exclusive possession of the effects of the partnership property, to pay its debts out of such property and to settle its business. He is invested with large discretion in settling up the affairs of the partnership.

5. **SAME—Execution Liens of Judgment Creditors.**—The execution lien upon the partnership assets of a judgment creditor who, in the absence of fraud, obtains judgment by confession against a partnership upon warrant of attorney signed by the surviving partner in the firm name, is equal to the execution lien of a creditor who obtains his judgment after a summons and trial.

6. **PREFERENCES—Right of Insolvent Debtors.**—The right of an insolvent debtor to prefer one creditor over others can only be exercised as to the amount due.

7. **INSOLVENT DEBTORS—Right to Give Judgment Notes.**—An insolvent debtor has no right to give a judgment note which provides for the collection of ten per cent additional, as an attorney fee for the preferred creditor. Such a provision is a mere gift, and fraudulent as to other creditors.

8. **SAME—Conveyances Without Consideration.**—When an insolvent debtor, voluntarily and without consideration, executes a conveyance or gift, his act in so doing, as to existing creditors, is fraudulent and void, regardless of whether the donee had knowledge of his insolvent condition.

**Voluntary Assignments.**—Error to the County Court of Montgomery County; the Hon. M. J. McMURRAY, Judge, presiding. Heard in this court at the November term, 1899. Affirmed in part, reversed in part and remanded. Opinion filed February 27, 1900.

**Statement.**—Martha Pritchett and Lewis Trexler, partners in the mercantile business at the village of Fillmore, Illinois, began purchasing goods on a credit from the McKee Shoe Company on the 15th of February, 1898, and continued to so purchase until the 8th of April, 1898, when Martha Pritchett died. The firm, at that time, owed the shoe company about \$700. Trexler continued the business and purchased from it until the indebtedness on the 9th of July, 1898, amounted to \$822.25. On that date he paid to the collecting agent of the shoe company \$100 in cash, and delivered to him for the balance of the account, six promissory notes signed "Pritchett & Trexler," containing power of attorney to confess judgment. On the 11th of July, 1898, a judgment by confession in vacation was entered before the clerk of the Circuit Court against Lewis Trexler, Dora Trexler and Delbert Pritchett, as partners under the firm name of Pritchett & Trexler, for \$794.25, which included \$72 attorney's fees. Execution was issued immediately, and was placed in the hands of the sheriff, who, on the 12th of July, levied on Trexler's stock of goods. After that, but on the same day, Trexler, as surviving partner, made a general assignment for the benefit of creditors and lodged his deed of assignment, with inventory attached, in the office of the clerk of the County Court. On the 13th of July, John Green, named in the deed of assignment as assignee, qualified as assignee. Finding the goods in the possession of the sheriff by virtue of the levy of execution, Green reported the situation to the County Court, and an arrangement was entered into whereby he was allowed to take possession of the goods, sell the same, and report the proceeds in court, the rights of the shoe company and the sheriff to be afterward determined.

Green realized from the sale of the goods, \$3,854.84. The claims allowed against the estate aggregated \$6,381.77. The County Court, over the objection of Bauer Grocery Company, held that the execution gave to the shoe company a prior lien, and ordered the full payment of the judgment out of the funds reported by the assignee. To reverse

that order, the Bauer Grocery Company prosecutes this writ of error.

ZINK, JETT & KINDER, attorneys for plaintiff in error;  
J. M. TRUETT, of counsel.

LANE & COOPER, attorneys for defendant in error.

MR. JUSTICE HARKER delivered the opinion of the court.

It is contended by the plaintiff in error that the judgment and execution upon which the defendant bases its right of priority over other creditors are void. The contention is founded upon the proposition that a surviving partner has no power to give a note and power of attorney to confess judgment in the name of the firm. That a surviving partner has no such power is a well established rule of law. But, while a judgment confessed upon it would be void as to the estate of the deceased partner, it would be valid as to the partner who executed the note and warrant. If the note was for a partnership debt, we see no reason why the judgment could not be satisfied out of the partnership assets. Where one of two partners dies, suits at law must be against the surviving partner, and in the event of recovery satisfaction can be obtained out of the partnership property.

When Trexler's partner died, the law made it his duty to take exclusive possession of the effects of the partnership, to pay its debts out of the same and to settle its business. Sec. 89, Ch. 3, Hurd's Revised Statutes, 123. He was invested with large discretion in settling up the affairs of the partnership. It will hardly be contended that satisfaction of a judgment rendered against him upon summons, etc., for a partnership debt, could not have been had out of the partnership assets prior to the assignment. The execution lien of a judgment creditor who, in the absence of fraud, obtains judgment by confession, is equal to the execution lien of a creditor who has obtained his judgment after a summons and trial.

It is contended that the County Court erred in not hold-

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ing the judgment void to the extent of \$72, the amount of the attorney's fees included. The right of an insolvent debtor to prefer one creditor over others can only be exercised as to the amount actually due. He has no right to give a note for the amount due which provides for the collection of ten per cent additional as an attorney fee for the preferred creditor. The provision as to the attorney fee is a mere gift and fraudulent as to other creditors. *Hulse et al. v. Marshon et al.*, 125 Ill. 52; *Young v. Clapp*, 147 Ill. 176; *First National Bank of Pana v. Havens and Geddis Co.*, 61 Ill. App. 213.

An attempt is made to distinguish this case from the ones cited, in that the defendant in error, at the time of accepting the notes from Trexler, did not know he was insolvent, while, in the cases cited, the preferred creditor did know that their debtor was insolvent. On principle, we do not see how that should make any difference. When an insolvent debtor, voluntarily and without consideration, executes a conveyance or gift, his act in so doing is, as to existing creditors, fraudulent and void, regardless of whether the donee had knowledge of his insolvent condition.

The order of the County Court will be affirmed as to payment of amount of judgment of defendant in error except as to attorney fee of \$72, and as to that amount, it will be reversed. The cause will be remanded with directions to the County Court to enter an order in accordance with this opinion.

Affirmed in part, reversed in part and remanded.

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### The Kellyville Coal Co. v. Jesse Humble.

1. FELLOW-SERVANTS—"Dirt Scratcher" and "Boss Driver."—A dirt scratcher and a boss driver in a coal mine are fellow-servants when engaged in doing the same work.

Action in Case, for personal injuries. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

D. D. EVANS and G. M. McDOWELL, attorneys for the appellant.

S. A. BRISTOW and MABIN & CLARK, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellee was employed in appellant's coal mine, and worked under one Preston Howard, who was boss driver. He claims that he was employed as a "dirt scratcher" only. Howard had charge of the dirt scratchers and timbermen of the day force in the mine. It was the duty of the timbermen to timber the entries and cross-cuts of the mine and, when occasion required, to take down the timbers. It was the duty of the dirt scratchers to take down loose rock, clear away dirt and perform such other like work as required no special skill or experience.

When the injury which is made the basis of this suit occurred, appellee had been employed in the mine five or six months, and had on several occasions, when directed by Howard, assisted in removing timbers. In the same mine was working a timberman by the name of Golding. On the occasion of the accident, Golding called on appellee to assist him in "throwing a fall" in a cross-cut. The post or prop supporting the roof was wedged in tightly, and to loosen it appellee struck it several times with a sledge which caused it to give way and let down on appellee several tons of coal, rock and timbers. For the injuries thereby received appellee brought this suit and recovered a judgment against appellant for \$1,000.

The negligence alleged against appellant was in directing appellee to perform the duty of a timberman when he was inexperienced in that line of service and was employed as a dirt scratcher only. There was a conflict in the testimony as to whether appellee was employed generally to do any work in the mine to which he might be directed, or whether his employment was confined to the duties of a dirt scratcher. It does not appear that he at any time objected

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to assisting timbermen, although he frequently performed that service. On the day of the injury he was not directed by his boss, Howard, to render any such service, but went at it upon the request of Golding.

To throw the prop by striking it with a sledge was dangerous and improper. The proper way was for the party to stand aside and ram it with a piece of timber. Appellee testified that he used the sledge because Golding directed him to do so. That Golding denies. The conflict is unimportant, because in our view appellee and Golding were fellow-servants. Appellant could not be held responsible for such a direction, although erroneous, unless Golding was a vice-principal. Howard was the common foreman under whom both appellee and Golding worked. Although he may have directed appellee to assist Golding on previous occasions, that would not make Golding a vice-principal. While Golding may have been directing the work, the two were, nevertheless, doing it together. Golding had no power to compel the appellee to work in a particular manner, and discharge him if he refused. The case of *Agnew v. Supple*, 80 Ill. App. 437, is in point.

We think the jury was erroneously led into the view that Golding was a foreman or vice-principal over appellee by the sixth instruction given for the plaintiff. Such an instruction was erroneous in the absence of proof showing that Howard had authority to appoint Golding to act as a vice-principal. The effect of the instruction is to take away from the jury the consideration of whether Golding was a fellow-servant with appellee.

No error was committed by the refusal of instructions. The law contained in the first and fourth, refused, was embodied in others given.

For error in giving the sixth instruction for appellee and because the verdict is against the evidence, the judgment must be reversed and the cause remanded.

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### American Central Ins. Co. v. J. B. Henninger & Co.

1. *INSURANCE—Waiver of Proofs of Loss.*—Where an insurance company denies its liability, it waives proof of loss or defects in proofs already furnished and suit can be brought at once without such proofs.

2. *SAME—Waiver of Conditions in the Policy.*—Where an insurance company denies its liability for a loss under the policy such denial operates as a waiver of a provision requiring the policy holder to furnish a certificate of a magistrate or notary public stating that he had examined the circumstances of the fire and believed that the insured had honestly sustained loss.

3. *PROPOSITION OF LAW—Must be Submitted in Apt Time.*—Propositions of law not submitted to the court until after the decision has been rendered come too late.

*Assumpsit.*—On insurance policy. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

OWEN & OWEN, and WELTY & STERLING, attorney for appellant.

FIFER & BARRY, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court.

This was an action of assumpsit on two fire insurance policies issued by appellant to appellee on a stock of boots and shoes at Leroy, Illinois. One policy was issued on the 2d and the other on the 11th day of May, 1899. The fire which caused the loss occurred early on the morning of the 12th of May. It was extinguished before the goods were totally consumed, but not until after they had been greatly damaged. The company denied liability and defended upon the following grounds:

1. The plaintiffs fraudulently misrepresented the value of the goods at the time the last policy was made.

2. The plaintiffs failed to comply with the requirements of the policies:

(a) In not furnishing proper proofs of loss, containing copy of descriptions and schedules in other policies;



(b) In not furnishing an inventory showing cash value of each item of loss;

(c) In not furnishing a certificate of a magistrate or notary public stating that he examined the circumstances of the fire and believed that the insured had honestly sustained loss;

(d) In Henninger's refusal to submit to examination under oath touching the origin of the fire and the amount of loss.

(e) In refusing to produce for examination books of account, invoice and vouchers.

(3) The fire was caused by plaintiff Henninger for the purpose of causing loss.

4. The judgment is excessive.

A jury was waived and the case was tried by the court, who rendered judgment for the plaintiffs in the sum of \$668.71, and from this judgment this appeal is prosecuted.

The value of the goods at the time of the application for the second policy may have been placed rather high by Henninger, but we are unable to say that there was such fraudulent representation in that particular as to render the policy void.

There is testimony in the record that appellant's adjuster, after making an examination, denied all liability and said that his company would pay nothing on the policies. The adjuster testified that he made no such statements. It was the peculiar province of the trial court to find the truth in the conflict, and we are not inclined to say that he erred in finding, as he did, that appellant denied all liability. Under that finding, it is immaterial whether proper proofs of loss were submitted or not. The rule is firmly established in this State that where an insurance company denies liability, it thereby waives proof of loss, and suit may be brought at once without such proof. *Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill. 453; *Mechanic's Ins. Co. v. Hodge*, 149 Ill. 298.

Such denial also operates as a waiver of a provision requiring the insured to furnish a certificate of a magistrate or notary public stating that he had examined the circum-

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stances of the fire and believed the insured had honestly sustained lost.

The same rule applies to the alleged refusal of Henninger to submit to an examination under the oath touching the origin of the fire and the amount of loss, and the refusal to produce for examination books of account, invoice and vouchers. As a matter of fact Henninger did submit to an examination under oath and was rigidly examined by the adjuster. The complaint seems to be that he would not submit to another examination. It is true, also, that proofs of loss were furnished, but appellant contends they were defective and did not fulfill the requirements of the policies. The rule of waiver above mentioned would apply to a case of defective proofs as well as to a case where there were no proofs of loss at all.

The chief contention, and doubtless the one that caused the adjuster to deny the liability of the company, is that Henninger started the fire.

The evidence shows that the stock of boots and shoes insured were kept on the west side of a store room lighted by electricity. On the other side of the room was a stock of notions owned by other parties than appellees. To the rear of the store room was a vacant room, separated from the store room by a board partition. On the night previous to the fire, appellees and a clerk were in the store, invoicing, until nearly twelve o'clock. Owing to the electric lights being stationary, it was found necessary to use a coal-oil lamp. The electric lights in the building burned all night and it is not known whether the lighted lamp was extinguished when the parties left the store. The chief evidences of the fire were in close proximity to the place where the lamp was used, and where it was found broken into a great many pieces. There were other evidences, such as the odor of coal oil, loosing of the wall paper, etc., indicating that the lamp exploded. Henninger left the building about twelve o'clock and returned between half past four and five o'clock in the morning. He at once discovered the fire and gave the alarm. There were several circumstances connected with his discovery of the fire and his

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conduct calculated to subject him to suspicion. He offered in his testimony full explanation of them, however, and the trial court was in much better situation to pass upon his testimony than we are. We are not prepared to say that his explanation was not true and that the court below erred in not finding that he started the fire.

It is assigned for error that the court refused to hold as the law certain propositions submitted by appellant. The propositions were not submitted to the court until after the decision had been rendered. They came too late. A party desiring to have propositions of law passed upon by the court must submit them at the time the case is tried. They come too late after the court has announced a decision. *Alleman v. Lumsden*, 159 Ill. 219; *Carlyle Water Co. v. City of Carlyle*, 31 Ill. App. 325; *London v. Mullens*, 52 Ill. App. 410.

We see no reason for reversing the judgment. Judgment affirmed.

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187	446

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1. **JUDGMENTS**—*Power of the Court to Enter Nunc pro Tunc, at a Subsequent Term.*—A court is powerless to enter a judgment *nunc pro tunc*, as of a former term, when in fact no such judgment was then ordered.

2. **SAME**—*What is Not a Judgment.*—The words "Judgment on attachment and on claims for \$414.50 and costs of suit," do not constitute a judgment. They amount to no more than a finding, a minute from which a judgment may be written.

**Attachment.**—Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

J. B. HUTCHINSON, attorney for appellant.

WILBER, ELDRIDGE & ALDEN, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee sued out a writ of attachment against appellant

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August 2, 1895, which was served upon the Leavitt & Oglevee Co., as garnishee. In this suit a declaration in assumpsit was filed. At the December term, 1896, of the Circuit Court, before the garnishee had answered the interrogatories, and without judgment having been entered against appellant upon the cause of action stated in the declaration, a judgment was entered against the garnishee for \$577.55 in favor of appellant for the use of appellee. At the March term, 1897, upon the motion of appellee the court entered judgment against the appellant for the same amount, *nunc pro tunc*, as of the previous term, which subsequently, at the March term, 1898, the appellee moved the court to set aside, and at the August term, 1898, a like motion was made by appellee to set aside all orders made in the case since August 21, 1896, which motions were by the court sustained and the judgment and orders set aside. After this appellant pleaded to the declaration, and issues were thus formed and tried by the court, a jury having been waived, resulting in a finding and direction by the court for a judgment against appellant for \$414.50, to reverse which this appeal is prosecuted. The principal reasons urged for a reversal of the judgment are that the court erred in its findings and rulings as to the law in the decision of the case and in setting aside orders previously made and in vacating the judgment against the garnishee.

It may be the court had no authority to set aside the judgment against the garnishee at a subsequent term as it did, but if this is so, and the judgment for such reason is still in force, that could avail nothing to appellant as a defense to the action unless such judgment had been paid, or accepted by appellee in satisfaction of the cause of action set forth in its declaration. The former is not claimed, and while appellant claims the latter to be true, the court, upon the evidence heard by it, found against appellant upon this point, and we think such finding was warranted by the evidence. The vacation of the judgment that had been entered *nunc pro tunc* as of a former term was proper for the reason the court was powerless to enter it, no judgment

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having in fact been ordered at such former term, and it does not appear that any minute or memorial paper existed from which such judgment could properly have been entered. Even if it was irregular for the court to vacate such judgment at the time it did so, appellant was not harmed by such order, and beside all this, the action of the court in setting aside the orders and judgment previously entered is not before us for review, for this appeal brings before us only the propriety of the finding and judgment of the court upon the issues arising upon the pleas to the declaration in the case. We find no reversible error in the rulings of the court upon the law in the decision of the case, and the evidence warranted the finding that was made.

That which is claimed to be the judgment of the court, from which this appeal is taken, is as follows: "Judgment on attachment and on claim for \$414.50 and costs of suit." One of the errors urged for reversal is that this is a defective judgment and as such it should be reversed, while appellee contends it should be affirmed as the judgment of the trial court. We are of the opinion the words quoted do not constitute a judgment nor do they bear any resemblance to a judgment. They amount to no more than a finding, a minute from which a judgment might be written, but in no just sense can it be maintained that in themselves they import a judgment.

Were it not that appellee insisted upon its affirmance, thereby claiming that such is a judgment upon which an execution might properly issue out of the trial court, we would be disposed to dismiss the appeal for the want of a final judgment from which an appeal could be prosecuted, as we held in *Metzger v. Morley*, 83 Ill. App. 113, subsequently affirmed by the Supreme Court; but both parties are here treating it as a judgment, and that being the issue presented to us for decision, and the same being in our opinion wholly ineffective as a judgment, we feel compelled to reverse the same for such reason, and will remand the cause to the trial court with leave to move the court for a proper judgment upon the finding. Reversed and remanded.

**Birdsell Co. v. The Illinois Malleable Iron Co.**

1. *RES ADJUDICATA—Former Decisions.*—In all material points this cause is like *Birdsell Manufacturing Company v. Independent Fire Sprinkling Company (ante)*, and will be governed by the same.

Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

J. B. HUTCHINSON, attorney for appellant.

WILBER, ELDRIDGE & ALDEN, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

In all material points this cause is like *Birdsell Manufacturing Company v. Independent Fire Sprinkler Company (ante)*, in which we have this day filed an opinion giving our reasons in the decisions of the case. This case will be decided in the same way and for the same reasons expressed in the opinion to which we have referred, and the judgment of the Circuit Court will be reversed and the cause remanded to that court for a proper judgment upon the finding. Reversed and remanded.

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**Wabash Railroad Co. v. George E. Stewart, Adm'r.**

1. *INSTRUCTIONS—As to Speed of Trains Being Dangerous.*—An instruction which submits to the jury the simple question of whether the speed of a train was so high and dangerous as to amount to negligence on the part of the company, and wholly omitting to submit to them other attending circumstances shown by the evidence which might have affected the safety of persons using a highway crossing and which were necessary to be considered in properly determining the matter, is erroneous as giving them an unbridled and unguided license to find any speed they might regard dangerous, to be negligence.

Wabash R. R. Co. v. Stewart.

2. *SAME—Must Be Based upon the Evidence.*—An instruction which, after telling the jury what signals the laws of the State require railroads to give before reaching and while passing over public highways, states that "it is a question for you to determine from the evidence whether the law was complied with by the company, and whether the deceased was or was not in a condition to have heard such signals if they had been given," is erroneous, as submitting a question not in issue by the pleadings and proofs, and calculated to mislead the jury as to what the laws require of railroad companies in regard to signals at public highway crossings for the benefit of persons using the same.

3. *SAME—Calling Attention to a Single Omission of Duty.*—An instruction which calls attention to a single omission of the defendant, and submits to the jury for their determination, without reference to any other surroundings or attendant circumstances, the question as to whether or not that omission constituted negligence, is erroneous as prejudicial to the contention of the company, that the facts and circumstances shown by the evidence did not require it to have a watchman at the place at the time.

**Action in Case.**—Death from negligent act. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed November 27, 1900.

**Statement.**—In the Circuit Court of Vermilion County, in an action on the case, the appellee, George E. Stewart, as administrator of the estate of Theodore T. Wade, deceased, sued the appellant for negligently causing the death of his intestate. The case was tried by jury and a verdict and judgment rendered for appellee for \$2,750. Appellant brings the case to this court, and urges a reversal of the judgment on the grounds that the verdict is contrary to the evidence; that the court improperly gave plaintiff's instructions numbers two and three, and improperly refused defendant's refused instruction number eight.

The declaration contained seven counts. The first averred that on January 1, 1899, defendant was operating a certain railway which crossed a public street or highway within the corporate limits of the village of Philo, Champaign county, Illinois, directly west of a certain grain elevator standing alongside the tracks and on the right of way of defendant; that defendant drove a certain locomotive engine and train of passenger cars called the "Continental

Limited," upon and over said railway and crossing, and failed to give the statutory signals, in consequence of which Theodore T. Wade, while going over said crossing in a buggy, and in the exercise of due care, was killed; and that Wade left surviving him, his mother, one sister and two brothers as next of kin.

The second is like the first except it charges the locomotive and train of cars which defendant drove over said crossing, was the one known as the "Fast Mail."

The third averred that the defendant drove a train of cars known as the "Continental Limited" along said railway from east to west over said crossing, and while Wade, in the exercise of due care, was riding in a buggy on said highway, over said crossing, defendant so carelessly, negligently and improperly ran said train at such a high and dangerous rate of speed that said Wade was struck and killed thereby.

The fourth is like the third except it charges that train to have been the one known as the "Fast Mail."

The fifth averred that defendant, by its servants, drove a certain locomotive engine and train of cars over and along said crossing so carelessly and improperly while Wade, in the exercise of due care, was driving in a buggy over the same, that it struck and killed him.

The sixth averred that defendant negligently suffered and permitted a certain grain elevator of immense size to stand on its right of way alongside the tracks of its railroad on the south side thereof, and close to said street or highway, so that the view of defendant's track to the east, was obstructed to a person traveling on said street on the south side of said tracks; that by reason of defendant's negligently permitting said elevator to so obstruct the view of persons traveling north on said street, said locomotive struck the buggy of said Wade, whereby he was thrown out and killed.

The seventh charges that defendant permitted an elevator of immense size to stand on its right of way so that it was an obstruction to the view of its tracks to the east of



said street, making said crossing dangerous for persons traveling on said street when coming on the crossing from the south; that defendant was running and operating a regular train over said railroad, which train was a fast passenger train known as the "Continental Limited," and regularly passed through said village and over said crossing at a high and dangerous rate of speed, and defendant, well knowing the dangerous character of said crossing, had undertaken, and did on other days, station a flagman at said crossing, before the approach of said train, so as to warn persons desiring to cross of danger; but at the time aforesaid, defendant wholly neglected its duty in that behalf, and failed to have the flagman at the crossing to warn persons desiring to cross; yet, nevertheless, the defendant then drove its said train over said crossing from east to west, at a high and dangerous rate of speed, when said Wade was driving in a buggy from north to south over the same, in the exercise of due care, and was struck by said train and killed because of the neglect of defendant as aforesaid.

The defendant pleaded not guilty. The evidence shows that on Monday morning, January 2, 1899, the body of Wade was found lying about forty feet west of the crossing in question, between the main and side tracks, and was full of cuts and bruises. His horse lay dead some fifty feet further west, with a large cut upon his rump and others on its body, and his buggy, completely demolished, lay a little east of his body. There were no marks upon the ground indicating that deceased, his horse or buggy, had been dragged from the crossing to the places where they were found. On the afternoon of January 1, 1899, Wade, with his horse and buggy, took his sister from his home in Polo, to a farm house in the country south of the crossing in question. Leaving her there at 5:30 o'clock p. m., he started to his home in Polo, and from the distance and the route he had to go, should have reached this crossing about six o'clock, or a short time thereafter. The "Continental Limited" train of defendant, going west, passed through

Polo that evening at two minutes past six o'clock, being several hours late. "The Kansas City Express," sometimes called the "Fast Express" of the defendant, going west, that evening passed Polo at eighteen minutes past six o'clock, being on time. The "Fast Mail" of the defendant, going west, passed Polo that evening at fifty-nine minutes past eleven o'clock.

There was a large grain elevator on the right of way of defendant, as described in the declaration, which obstructed the view of a person coming from the south on the highway in question, until he was within a very few feet of the main track on the crossing. The "Continental Limited" train was moving from fifty to sixty miles an hour when it passed over this crossing that evening, and the "Kansas City Express" train was running from forty to fifty miles an hour. Several witnesses testified that they did not hear any bell ring or whistle blow on the engine of either of said trains when passing through Polo or before arriving there, although they were where they could have heard them if they had been rung or whistled. No person saw either train strike Wade, his horse or buggy. Two witnesses testified that they were near the crossing in question at nine o'clock that evening when a freight train passed, and by the reflection of the headlight of the engine, they saw an object lying about where the body of the horse was found. Another witness testified that his horse became frightened at something lying near the west of the crossing when he passed about half past ten o'clock that night, but he was not able to tell what it was. A number of witnesses testified that Wade was a careful man, while two witnesses testified that he sometimes drove rapidly over railroad tracks.

The agent of defendant at Polo was required by defendant to watch this crossing when the "Continental Limited" train went through, and flag persons wanting to cross when it was approaching, and he had been so doing for some time before January 1, 1899, but was off duty that afternoon, and did not watch or flag the crossing for that train on that evening.

The servants in charge of both the "Continental Limited" and the "Kansas City Express" train in question, all swear that the bells on the engine on both trains were rung continuously by an automatic air device on each as they passed through Polo, and for a long distance on each side thereof, and that the regular crossing whistles were given by both engines as each of the trains passed through Polo; and several witnesses, not servants of the defendant, testified that they heard the whistle as each train approached Polo. Both engines of said trains were examined at the end of their runs by their respective engineers, who testified that there were no marks upon either of them indicating that they had struck anything that evening and they also swear that their engines did not strike anything as they passed through Polo that evening. Engineer Sweeny, in charge of a train of defendant, received a message at Bement, Illinois, at 12:20 on the night of the accident, saying, "Look out for a horse between the pass track and the main track at Polo."

The crossing was shown to have been one of the most traveled roads or streets in Polo, but the number of inhabitants of that village was not shown, nor that there was any ordinance in force, regulating the speed of trains passing through there.

Plaintiff's given instructions which are complained of are as follows:

2. "The court instructs the jury that if you believe from the preponderance of the evidence that the defendant was guilty of negligence in running its train over the crossing in question at a high and dangerous rate of speed, as alleged in the declaration, and if you further believe from a like preponderance of the evidence that by reason of such negligence the deceased, while in the exercise of due care for his own safety, as alleged in the declaration, was struck by said train of the defendant and thereby killed, you should find a verdict for the plaintiff."

3. "The court instructs the jury that by the laws of this State every railroad company is required to have a bell and steam whistle placed and kept on each locomotive engine, and cause the same to be rung or whistled at the dis-

tance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and to keep the same ringing or whistling until such highway is reached. It is a question for you to determine from the evidence whether the law as above stated was complied with by the defendant; and it is also for you to decide from the evidence whether Theodore T. Wade, the deceased, was or was not in such condition and so situated that he could have heard the bell or whistle if the former was rung or the latter sounded."

6. "The court instructs the jury that if you believe from a preponderance of the evidence that the defendant was guilty of negligence in not having a flagman stationed at the crossing in question, at the time the train known as the "Continental Limited" was approaching and crossing said crossing as alleged in the declaration, and if you further believe from a like preponderance of the evidence, that by reason of such negligence, the deceased, while in the exercise of due care for his own safety, as alleged in the declaration, was struck by said train of the defendant and thereby killed, you should find a verdict for the plaintiff."

And defendant's refused instruction, which it is claimed was error to refuse, is as follows:

8. "If the jury believe from the evidence that the elevator in controversy in this case was placed where it is for the convenience of trade and commerce, and was used at the time of the accident for the convenience of trade and commerce, then the court instructs the jury that the defendant is not guilty of negligence in this case for permitting the elevator in controversy to remain where it is."

GEORGE B. BURNETT, attorney for appellant.

CHAMBERS & FLYNN and JONES & PARTLOW, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

As to the first insistence made by counsel for appellant, that the verdict was against the evidence, and the trial court erred in not setting it aside on that account, all we will say is that we express no opinion on that question because we feel compelled to reverse the judgment on

account of erroneous instructions given at the instance of the appellee, and will remand the case for another trial on that account.

Appellant insists that the court committed reversible error in giving plaintiff's instructions numbered two, three and six which are quoted in the statement preceding this opinion. By instruction number two the court told the jury if they believe from the evidence that the defendant was guilty of negligence in running its trains over the crossing at a high and dangerous rate of speed, as alleged in the declaration, and that by reason of such negligence the deceased, while in the exercise of due care, was struck by said train and thereby killed, then they should find a verdict for the plaintiff; thereby submitting to the jury the simple question of whether the speed of the train was so high and dangerous as to amount to negligence on the part of the defendant in so running its train, and wholly omitting to refer the jury to other attending circumstances shown by the evidence, which may have affected the safety of persons using the highway and crossing in question, and which were necessary to be considered by the jury in properly determining the matter, and thus giving unbridled and unguided license to the jury to find any speed they might regard dangerous to be negligence. This instruction was well calculated to prejudice the jury against the contention of defendant on the trial, that the speed of the train was not dangerous to persons using the highway in question, in view of all the facts, circumstances and surroundings appearing from the evidence, for which reason it ought not to have been given, and by giving it the court committed reversible error.

Plaintiff's instruction number three, after telling the jury what signals the laws of this State required every railroad to give before reaching, and while passing over, public highways, then proceeded as follows :

"It is a question for you to determine from the evidence whether the law as above stated was complied with by the defendant; and it is also for you to decide from the evi-

dence whether Theodore T. Wade, the deceased, was or was not in such condition that he could have heard the bell or whistle if the former was rung or the latter sounded."

This instruction submitted to the jury a question not in issue by the pleadings or proofs, for in neither does it appear that the plaintiff or defendant claimed or attempted to show that the condition or situation of the deceased was such that he could not hear signals if they were actually given, and therefore the court ought not to have submitted that question to be decided by the jury; besides, the instruction was well calculated to mislead the jury as to what the laws of this State require of railroad companies in regard to giving signals at public high way crossings for the benefit of persons using the same, and was well calculated to prejudice the defendant before the jury, and it was reversible error to give it.

Plaintiff's instruction number six, like his number three, singles out a single omission of the defendant, and submits to the jury for their determination, without reference to any other attendant circumstances or surroundings, whether or not that omission constituted negligence. While under certain circumstances the defendant ought to have had a watchman at the crossing in question when the "Continental Limited" approached and passed over it, yet to warrant the jury in finding that the defendant was negligent by reason alone of failing to have one there, depended upon circumstances and surroundings then existing, which the jury should have considered in arriving at a proper conclusion, and to which their attention should have been directed by the instruction but was not. Such omission was harmful to the contention of appellant that the facts and circumstances shown by the evidence did not require it to have a watchman there at the time.

Defendant's refused instruction number eight stated that the defendant was not guilty of negligence in permitting the elevator to be on its right of way, if it was there for the convenience of trade and commerce. The court properly refused it because neither in the declaration nor by the

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evidence did plaintiff claim that the defendant was negligent for that reason alone. It was proper for the plaintiff to aver and prove that the elevator was so situated as to obstruct the view of defendant's trains to persons approaching the crossing on the highway from the south, as an attendant circumstance to show the negligence charged and attempted to be proved. The giving of that instruction as drawn, was calculated to confuse the jury, and would have prejudiced the rights of the plaintiff, for which reason it was properly refused.

For the errors indicated we reverse the judgment of the Circuit Court and remand the case for such further proceedings therein as to law and justice appertain.

87	455
189	543

### James Vause Jr., v. Chas. Templeton.

1. NEGLIGENCE—*When One of Two Persons Must Suffer.*—When a loss must ensue in consequence of misleading appearances the loss in equity will be visited upon the party suffering such appearances to exist and not upon innocent persons who have been misled by them.

2. DECREES—*Must be Supported by the Evidence.*—A decree which is not supported by the evidence will be reversed.

**Bill to Set Aside a Sale.**—Appeal from the City Court of Mattoon; the Hon. JAMES F. HUGHES, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

EMERY ANDREWS and ISAAC B. CRAIG, attorneys for appellant; JAMES VAUSE JR., *pro se*.

CLARK & SCOTT, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was a bill in equity filed by the appellee against appellant to set aside a sale under judgment and execution

against John B. Barnett, of lot 1, block 44, Mattoon, Illinois, and to remove the same as a cloud upon the title of appellee. The bill was answered, and upon the hearing the court decreed in accordance with the prayer of the bill, to reverse which appellant prosecutes this appeal and seeks a reversal of the decree chiefly because, as he insists, the decree is not supported by the evidence in the case, and that it is against equity.

It appears that at one time Mary A. Joseph owned a lot and conveyed it to her sister, Sarah F. Templeton, and the latter, December 10, 1898, conveyed the same to John B. Barnett, it being claimed by appellee the latter conveyance was for his use by verbal understanding of the parties. Barnett executed and delivered a deed of conveyance of the lot to appellee February 24, 1899, which was recorded March 24, 1899. Appellant purchased the note of Barnett given to John Hall for \$600, upon which judgment was recovered March 23, 1899, and the lot was sold to appellant under execution issued upon that judgment. Appellee claims by his bill and by the evidence in the case that he took possession of the lot immediately upon the delivery of the deed to him by Barnett, and that he thereafter remained in the open and exclusive possession of the same and that such possession constituted notice of his title.

Previous to the time of the deed to appellee it appears from the evidence that Mrs. Joseph lived in part of the house upon the premises and that Barnett boarded there, and other parts of the house were rented to other tenants, and that Barnett attended to the leasing and collection of rents, which he continued to do after the deed was executed to appellee. Barnett also negotiated with the loan association for a loan to be made to him and secured by mortgage upon the premises, which fact was known to appellant when he purchased the note from Hall, and caused the judgment to be taken against Barnett.

Upon an examination of the evidence we are compelled to the conclusion that Barnett, by his acts, appeared to own and control the property, and adding to these acts the ap-



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Rodgers v. Johnson.

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pearance of his record title, no other reasonable belief could be induced in the mind of ordinary persons who might be inclined to deal on the faith of appearances, than that Barnett was the owner. To hold otherwise would be in effect to set aside the objects of the recording law and make it an instrument to mislead instead of protection. If appellee assumed the possession and control of the property when the deed was delivered to him, it was his duty to have recorded his deed or to have discharged Barnett from continuing in the apparent control and ownership. He did neither the one nor the other, but allowed the title of record and the appearance and acts of ownership to remain with Barnett until appellant obtained a judgment against him, and if loss must ensue in consequence of such negligence on his part, the loss, in equity, should be visited upon himself, and not upon the innocent, who have been misled by appearances so negligently suffered to exist. Believing as we do that the decree is not supported by the evidence, it will be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed. Reversed and remanded.

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**Edward Rodgers v. George Johnson.**

1. INSTRUCTIONS—*With Nothing in the Evidence to Support Them.*—Instructions with nothing in the evidence to support them are erroneous.

**Replevin.**—Appeal from the Circuit Court of McLean County. The Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

FRANK Y. HAMILTON, attorney for appellant.

L. C. HAY, attorney for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant brought action in replevin against appellee to recover possession of a dry-pan. A trial by jury resulted in a verdict and judgment for a return of the property, to reverse which he appeals to this court, assigning for errors that the court admitted improper evidence, misdirected the jury, refused proper instructions, and that the verdict is against the law and the evidence of the case.

Appellant resides at Alton, Ill., where he is engaged in manufacturing brick, and was also interested in a brick plant at El Paso, Texas. He purchased a dry-pan of McGregor Brick Co., Bloomington, Ill., and appellee insists it was purchased for and as the property of the brick company at El Paso, and levied an attachment writ upon it, at the suit of Elder & Dunlop against the El Paso Brick Company. On the trial appellant and Rowson, the manager of McGregor Brick Co., testified that the pan was purchased by appellant for himself. He paid for it out of his own money, by personal check of \$400, on Alton National Bank, took a bill of sale of the pan to himself individually, and ordered it shipped to his son at El Paso, Texas. Against this evidence it is contended by appellee that appellant bought the dry-pan for the El Paso plant; that he had frequently said and written in letters that he wanted a pan for that plant. In his testimony on the trial appellant admitted the pan was intended by him for the use of the El Paso plant; that such plant was not making money at that time; needed the use of a dry-pan; was unable to make the purchase, and desiring to help it along, he himself made the purchase on his own account, and was merely loaning the pan to the El Paso Brick Co., and that the shipment to his son was for such purpose. We are of the opinion the evidence fails to show any title or interest of the El Paso Brick Co. in the property, and there is no evidence tending to show it ever had possession or control of the dry-pan, and the instructions of the court to the jury based upon such alleged possession as

## Jennings v. Scott.

constituting *prima facie* evidence of ownership, had nothing in the evidence to support them, and for such reasons were misleading and erroneous. It may be true appellant bought the pan for such company, for its use, and this would be consistent with his ownership. For the reason that the verdict is against the evidence, and the court erred in its instruction to the jury, the judgment of the Circuit Court will be reversed and the cause remanded for a new trial. Reversed and remanded.

## Andrew Jennings et al. v. John L. Scott et al.

1. **MANDAMUS—Removal of Obstructions in Highways.**—Under the facts stated in the amended petition in this case, which is admitted by the demurrer, the court holds it to have been the clear duty of the highway commissioners to remove the obstruction.

**Mandamus.**—Appeal from the Circuit Court of Edgar County; the Hon. HENRY VAN SELLER, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded with directions. Opinion filed February 27, 1900.

## COPY OF THE AMENDED PETITION FOR MANDAMUS.

STATE OF ILLINOIS, }  
Edgar County. } ss.

To the Honorable Judge of the Edgar Circuit Court, at the June term, A. D. 1899 :

Your petitioners, Andrew Jennings, Jesse Thompson, Nelson Thompson and Elija Jennings, respectfully show unto your honor that they are one and all legal residents and taxpayers in the township of Prairie and the county of Edgar aforesaid.

Your petitioners further show unto your honor that in said township of Prairie there is a certain public highway, by user, which from the northwest corner of the southeast quarter of the northeast quarter of section 18, T. 16 N., R. 10 W., in Edgar county, Illinois, extends and runs in an easterly course until it meets a certain other road or highway running north and south through about the center of section 17, T. 16 N., R. 10 W., of said county, meeting said

last road at the northeast corner of the southeast quarter of the northwest quarter of section 17, T. 16 N., R. 10 W., said road being of the width of forty feet, or about that width.

That said first described road or highway has been continuously used by the public as a public highway for the space of more than thirty-five years prior to the filing of this petition. That at the time said road was first used as a public highway, its boundaries were established by fences on the north and south side of it respectively, such fences being continuous on both sides of said highway.

Affiant further says that said fences, so establishing the boundaries of said highway, remained in the same position continuously for upwards of thirty-five years, during all of which thirty-five years said road was used as a public highway, so that the said tract of land lying between said fences became, was and is a public highway by user. That about nine years ago one Alonzo Kennedy (son of A. J. Kennedy, owner of the land upon the south side of said highway) moved the boundary fence upon the south side of said highway north into said highway for the space of, to wit, ten feet along the entire length of said highway, thereby narrowing the width of said highway by the space of, to wit, ten feet. That said fence was so moved into the said highway unlawfully, and has been unlawfully allowed to remain in said highway from the time it was so moved until the filing of this petition. And that said fence is now obstructing said highway and is a hindrance to public travel, and that said fence is the obstruction complained of in this petition, and that people traveling over this said highway are greatly inconvenienced by said obstructing fence.

Your petitioners further state that John L. Scott, Josiah Bonwell and John H. Mitchell, who are hereby made defendants unto this petition, are the highway commissioners of said Prairie Township. Petitioners further show unto your honor that upon the 31st of July last, Andrew Jennings, one of your petitioners, served a notice in writing upon said commissioners of highways, notifying them of the existence of said obstructions in said highway and asking the said commissioners to have the same removed therefrom. That said written notice was duly served upon said highway commissioners by handing a copy of the same to each of said commissioners upon the 31st day of July, A. D. 1899, and at the same time informing him of its contents, a true copy of which notice is hereunto attached marked exhibit "A" and made a part of this petition.

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Jennings v. Scott.

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Your petitioners further show unto your honor that said highway commissioners have wholly neglected and refused to take any steps whatsoever toward having such obstructions removed from such public highway and have notified your petitioner, Andrew Jennings, in writing, that they do not intend to have such obstruction removed therefrom.

By means of which neglect and refusal to perform their public duties said commissioners are allowing and will continue to allow such unlawful obstructions to continue and remain in said public highway, and will continue to allow public travel over such highway to be greatly obstructed, annoyed and inconvenienced.

Wherefore, etc.

JAMES A. EADS and DUNDAS & O'HAIR, attorneys for appellants.

J. W. HOWELL and VAN SELLAR & SHEPHERD, attorneys for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The record in this case shows that the amended petition filed in the Circuit Court of Edgar County, by appellants, as residents and taxpayers of their township in that county, against the appellees as commissioners of highways of that township, prayed for a peremptory writ of mandamus compelling appellees, as such commissioners, to remove or cause to be removed, a certain fence alleged to be an obstruction upon a certain described highway of said township, of which appellees had notice, but refused to remove it or cause it to be removed.

The appellees demurred to the petition as amended, and it being sustained, appellants abided by their amended petition and the court dismissed it, rendering judgment accordingly; to reverse which, appellants prosecute this appeal.

Under the facts stated in the amended petition, which were admitted by demurrer, it was the clear duty of appellees to have caused the obstruction named in the petition to be removed. *Brokaw v. Comrs. of Highways*, 130 Ill. 482.

Appellees contend in this court, that the highway claimed

to be obstructed in the petition, is not described with sufficient certainty, as several routes would answer such description. The amended petition, we find, does definitely fix the termini of the highway in question, approximates its width and gives its general direction; and in the absence of even a claim that there is more than one highway which might answer equally as well to the description given, it seems to us that it would be unreasonable to conclude that a person of ordinary intelligence would not easily discover the highway intended, and find the obstruction described in the petition, if it was there as alleged.

We think the Circuit Court erred in sustaining the demurrer to the amended petition, for which reason its judgment will be reversed and the case remanded with directions to overrule the demurrer to the amended petition, and then proceed as to law and justice appertain.

Reversed and remanded with directions.

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**Robert Kile, Adm'r, v. Mary Goodrum and Green Goodrum.**

1. **INTERPLEADER—*Requisites of the Bill.***—The essential requisites of a bill of interpleader are (1), that the same thing, debt, or duty, is claimed by both or all of the parties against whom the relief is demanded; (2) that all the adverse titles or claims be dependent, or be derived from a common source; (3) that the person asking for the relief do not have or claim any interest in the subject-matter; (4) that he stand perfectly indifferent between those claiming the thing, debt or duty, being in the position purely of a stakeholder.

**Bill of Interpleader.**—Appeal from the Circuit Court of Edgar County; the Hon. HENRY VAN SELLER, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded with directions. Opinion filed February 27, 1900.

**Statement.**—Robert Kile, as administrator, with the will annexed of H. N. Guthrie, deceased, filed in the Circuit Court of Edgar County a bill of interpleader against

## Kile v. Goodrum.

Mary Goodrum, in her own right, and Green Goodrum, as administrator of the estate of William Goodrum, deceased, in which, among other things, was averred in substance that H. N. Guthrie when he was alive, boarded most of the time from July 17, 1896, to November 1, 1897, in the house with said William and Mary Goodrum, who were husband and wife, and living together at the time; that H. N. Guthrie was owing one of them for his board when he died, on November 1, 1897; but that appellant does not know whether he owed it to said William or Mary, as each of them claim to be entitled to it, and each presented to the County Court of Edgar County, Illinois, where the estate of said Guthrie is being administered, a claim against that estate in which each of them claimed to be entitled to be paid for said board; and each procured said County Court to allow the claim thus presented against said estate, at the sum of \$90, for the identical same board, covering the same time; that appellant has appealed from each of such allowances to the Circuit Court of Edgar County, where each of said claims are now pending and undetermined; that upon the face of each of said claims, as filed in the County Court and now pending in the Circuit Court, it did not fully appear that each claimant was claiming board for said Guthrie for the identical time above stated, but from the evidence presented when those claims were heard in the County Court, it did appear that each of said claimants were claiming that the estate was indebted to him and to her for the same identical board; and until such hearing appellant did not know that both claimants were seeking to collect from said estate the same identical board bill; that appellant is ready and willing to pay to the proper one of the appellees the true amount of board due from Guthrie for the time he boarded at the Goodrum house, during the time above stated; that appellant does not collude with either of the appellees touching the matters covered by said claims for said board, nor is he in any manner identified by the appellees or either of them; nor has appellant exhibited this, his bill of interpleader, at the request of appellees, or

either of them, but merely of his own free will, and to avoid having to pay twice for the same board of said Guthrie.

The amended bill prays that appellees may interplead and settle and adjust to which one of them the estate of said Guthrie is indebted for the board of said Guthrie from July 17, 1896, to November 1, 1897, while boarding at the house occupied as the house of said William and Mary Goodrum; and that appellant may bring into court such sum, whatever the court may determine it to be, for the benefit of such one of the appellees as the court shall determine is entitled thereto. An injunction is also prayed for against appellees proceeding against appellant in any action at law based upon their above respective claims.

To the amended bill, Green Goodrum, one of the appellees, interposed a general demurrer, which being sustained, he stood by his amended bill, and the court entered a decree dismissing the same, with costs against the appellant.

Appellant brings the case to this court by appeal, and urges a reversal of that decree upon the ground that the court improperly sustained the demurrer to the amended bill, when it stated facts sufficient to require it to be answered.

DUNDAS & O'HAIR, attorneys for appellant.

R. L. MCKINLAY, J. W. HOWELL, VAN SELLAR & SHEPHERD, attorneys for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

We have examined the amended bill of interpleader filed by appellant in the Circuit Court of Edgar County against appellees, and find that it properly avers that appellees each claim from the estate of H. N. Guthrie, deceased, of which appellant is the administrator, the amount of a certain board bill owing by said deceased, in his lifetime, to one of them, but which one appellant does not know; that each of the appellees are prosecuting a claim against said



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Stanley v. Leahy.

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estate for said board bill; and that appellant fears he may be compelled to pay the same twice, for which reason he asks the court to compel them to answer his bill of interpleader, and allow the court to determine to which one he shall pay said board bill. By his bill appellant offers to bring the amount due from said estate for said board into court for the benefit of such one of the appellees as the court shall determine it belongs, and he disclaims all interest in such board bill, or that he has in any manner obligated himself to pay the same to one of the appellees in preference to the other, but that he stands indifferent between them; thus filling every requirement of a good bill of interpleader, as defined by Sec. 1332 in 3 Pomeroy's Equity Jurisprudence: (1) that the same thing, debt or duty is claimed by both or all of the parties against whom relief is demanded; (2) all the adverse title or claim is dependent on or is derived from a common source; (3) the person asking the relief does not have or claim any interest in the subject-matter; (4) he stands perfectly indifferent between those claiming the thing, debt, or duty, being in the position merely of stakeholder. See also *Newhall v. Kastens et al.*, 70 Ill. 156; *Ryan v. Lamson et al.*, 153 Ill. 520; *Platte Valley Bank v. Nat. Bank*, 155 Ill. 250; and *Morrill v. Manhattan Life Ins. Co.*, 183 Ill. 260.

It was, therefore, error for the court to sustain the demurrer to appellant's amended bill, for which reason we reverse the decree appealed from, and will remand the case with directions, to overrule the demurrer to the amended bill, and then proceed as to law and justice appertain. Reversed and remanded with directions.

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Mary F. Stanley v. Edward Leahy et al.

1. DRAM-SHOPS—*Injuries to Wives, etc.*—A wife injured in her means of support by the sale of intoxicating liquors to her husband, may proceed jointly or severally against the persons who caused the intoxication.

2. *SAME—Satisfaction by One Defendant Bars Recovery Against the Others.*—A recovery and satisfaction against one of several persons, under the dram-shop act, will constitute an effectual barrier to a recovery against others, who may have, in part, contributed to cause such intoxication.

3. *RELEASE—To One of Several Persons Liable Under the Dram-shop Act Releases All.*—Where several are liable under the dram-shop act for causing the intoxication of a person, and the injured party, for a valuable consideration, releases one of them from further liability, such release is an effectual bar to a recovery against the others.

*Action Under the Dram-shop Act.*—Error to the Circuit Court of Cass County; the Hon. THOMAS MEHAN, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

MILLS & McCLURE, attorneys for plaintiff in error.

MATHER & SNIGG, attorneys for defendants in error.

MR. JUSTICE HARKER delivered the opinion of the court.

This was a suit under the dram-shop act, brought by Mary F. Stanley against Edward Leahy, John Leahy, Abe Jones and Joseph Lohman, charging them with selling liquor to her husband, which caused his intoxication and injury to her means of support. She dismissed her suit as to the defendants Joseph Lohman and Abe Jones. The other defendants filed pleas setting up that since the commencement of the suit their co-defendants, Joseph Lohman and Abe Jones, had paid to the plaintiff \$150, in consideration of which she had dismissed the suit as to them and released them from all liability. The plaintiff replied specially in three replications. The first replied that the damages from which Lohman and Jones were released were not the same damages she was claiming from the defendants Edward and John Leahy, but were for damages suffered by her prior to those inflicted by the Leahys. The second and third replied, in effect, that by the release to Lohman and Jones she only intended to release and only did release such damages as had been committed by them.

The court sustained a demurrer to all three of the repli-

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cations, and, as the plaintiff desired to stand by them, rendered judgment in bar of her action.

A wife injured in her means of support by the sale of intoxicating liquors to her husband may proceed severally or jointly against the persons who caused the intoxication, but there can be but one satisfaction for the injury. A recovery and satisfaction against one would constitute an effectual bar to any recovery against another who may have, in part, contributed to cause the intoxication. *Emory v. Addis*, 71 Ill. 273.

It is plain then, that if the plaintiff was paid \$150 by two of the four defendants originally sued, and that she, for such consideration, released them from further liability from injury caused by intoxication of her husband and to which all of the defendants had contributed, such release was an effectual bar to any recovery against the others. It makes no difference that she only intended to release Lohman and Jones. The court rightfully held the second and third replications bad, therefore. But it was error to hold the first replication bad. It averred specifically that the release pleaded was not from the damages sued for, but from such as had been suffered by her prior thereto. It was a sufficient reply to the plea.

For the error indicated, the judgment will be reversed and the cause remanded.

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E. W. Davis v. M. T. Shepherd.

1. *SALES—Of Growing Crops—Delivery of Possession—Fraud.*—The sale of a growing crop standing in the field, where the possession is permitted to remain with the vendor, is fraudulent *per se*, and void as to creditors and subsequent purchasers.

*Trial of the Rights of Property.*—Appeal from the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

E. J. MILLER, attorney for appellant.

JOHN R. & WALTER EDEN, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Execution having been issued from a court of record against Ira Ballard in favor of appellee it was levied by the sheriff upon the undivided half interest in forty-five acres of corn standing in the field, the other half belonging to the landlord whose tenant Ballard was. Appellant claiming to own the property by purchase from the tenant gave to the sheriff notice in writing of such claim and intention to prosecute the same as provided by statute, and trial by jury in the County Court resulted in a verdict and judgment in favor of the claimant, from which appellee prosecuted his appeal to the Circuit Court, in which a trial by jury resulted in the court directing a verdict against appellant, and the court having given judgment accordingly, he brings the case to this court by appeal, and assigns such action of the trial court for error, whereby a reversal of such judgment is sought.

There is no conflict in the evidence, nor as to what it proves. Ballard, as a tenant of the owner of the land, raised the corn, one-half to be his and the other as rent to the owner of the land. Appellant bought the corn at twenty-five cents a bushel, if Ballard hauled it, and twenty-three cents a bushel if he did not haul it. The quantity was estimated at from 700 to 900 bushels, and appellant paid Ballard by check \$75 and gave him credit with store and lumber account for \$85, and the total price was to be determined when the corn was marketed. Ballard had the privilege of feeding out of the corn four head of horses and a lot of hogs, which, from time of the sale to the time of the levy of the execution he did. Appellant wrote three notices of his purchase, which Ballard posted upon the premises, but never went to the corn, or assumed other possession or control, and in all other respects the corn

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remained, in its relation to Ballard, as it did previous to the sale. The corn had not been divided between Ballard and his landlord, and the duty remained for the tenant to perform. Upon these facts the court, at request of appellee, instructed the jury to find the issues in his favor, and it is now insisted by appellant the court erred in this regard, which is the only question presented for our decision.

In support of his position counsel for appellant insists that a sale of a growing crop, standing in the field, is complete when the contracting parties so intend it, and no manual delivery of possession can or need be made, for when the sale is complete both title and possession passes, and numerous authorities are cited to sustain this insistence.

The cases of *Meinke v. Nelson*, 56 Ill. App. 270, and *Bull v. Griswold*, 19 Ill. 633, cited by counsel in his brief, were cases in which the controversies were between the parties to the respective contracts themselves, and as to such parties no doubt can be entertained the sale would be valid and effective, for it is only where some creditor or subsequent purchaser intervenes that the question before us for judgment arises, which is not a question of fraud in fact, but of fraud *per se*. The case of *Graff v. Fitch*, 58 Ill. 375, also cited and relied upon by appellant, is easily distinguished from the case presented, for in that case the sale was not for an undivided interest, yet to be set apart, but for a part of a field of standing corn, where there was nothing to be done to identify the property, or to designate it from any common mass with which it was mingled. The subject of the sales was specific, and not indeterminate. It was a part of a field of corn which was marked off and separated from the rest of the field by a visibly marked boundary, the parties in that case having together gone to the corn field and cut off the tops of one row to a considerable distance, so there might be no mistake about the corn which Graff was to have. In *Thompson v. Wilhite*, 81 Ill. 356, the wheat had been cut down and all the possession taken that was possible. *Ticknor v. McClelland*, 84 Ill. 471, is to the effect that in case of a sale of standing crops, the pos-

session is in the vendee until it is time to harvest them, and until then he is not required to take manual possession of them. But in the case under consideration it was intended by the parties, at the time the sale was made, that the vendor should, and he did, retain possession for the purpose of feeding his own stock, and later to gather, harvest, divide and deliver the corn. Besides, it does not appear but the corn was ready to harvest at the time the sale was made. Numerous other cases are cited to the effect that where goods are ponderous and incapable of being handed from one to another there need not be a manual delivery, which rule it may be conceded is so firmly established as to be elementary law, but can have no application to this case, for the reason that it was not the intention of the parties that appellant should have all the possession of the corn of which it was possible, but the opposite was manifested by the facts that the tenant was to gather and divide the corn between himself and his landlord, and should further retain possession and dominion of the property that he might thereby be permitted to feed as much of it as he chose to his stock, all of which he did, whereby it was clear there was no apparent change in the possession of the property, and none was intended, even to the extent to which its nature was susceptible.

So the case settles itself upon the clear principle of the law as stated in *Rosier v. Williams*, 92 Ill. 187, where the court say it has been the settled law of this State, ever since *Thornton v. Davenport*, 1 Scam. 297, that all sales of chattels where the possession is permitted to remain with the vendor are fraudulent *per se*, and void as to creditors and subsequent purchasers, unless the retaining possessions be consistent with the deed.

Upon the facts in the case the conclusion of the law was that the sale by Ballard to appellant was as to appellee fraudulent *per se*, and nothing remained for the jury to try, and it was proper for the court to instruct the jury accordingly, as it did, and its judgment will be affirmed.

**Sarah H. Edwards v. William Harness et al.**

1. **BURDEN OF PROOF—*Statute of Limitations.***—In an action against the estate of a deceased person, the burden is upon the plaintiff to show the nature and amount of his claim, and that deceased was indebted to him, by a preponderance of the evidence, and when the statute of limitations is pleaded and the evidence shows that if any indebtedness exists it is beyond the statutory period, the burden of proof is also upon him to prove a new promise within the period of the statute.

**Assumpsit.**—Consolidated common counts. Error to the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

FRANK B. McKENNAN, attorney for plaintiff in error;  
OWEN T. REEVES, of counsel.

FIFER & BARRY, attorneys for defendants in error.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the Court.

Plaintiff in error brought suit against the estate of Isaac Harness, her deceased brother, to recover her share of her father's property, who died in 1840, and of whose estate Isaac Harness was administrator. Also for rents and profits received by Isaac Harness, as tenant in common in possession of lands of the estate of the father of Jacob Harness, and for the proceeds of lands sold, all of which it was alleged went into the hands of Isaac in his lifetime, and which he had kept for and promised to pay to plaintiff in error. To the declaration was pleaded the general issue, and the five year statute of limitations, to which latter was replied a new promise within five years. The issues thus formed were tried by jury, resulting in a verdict for the defendants, and after overruling a motion for new trial the court gave judgment against the plaintiff in bar of action, to reverse which this writ of error is prosecuted.

The burden of proof was upon the plaintiff in error to show the nature and amount of her claim and that deceased was indebted to her, by a preponderance of the evidence; and the statute of limitations having been pleaded, and the evidence showing that if any indebtedness existed it was beyond the period of limitation, the burden of proof was also upon her to prove a new promise within the period of five years next before the commencement of the suit. Upon an examination of the evidence we feel warranted in the conclusion there was a failure in these essential points, and are disposed to accept the verdict of the jury as decisive of those questions, there being no prejudicial errors in the admission or rejection of evidence. We think the instructions considered as a whole as fairly announced the principles of the law applicable to the issues being tried as the rights of the plaintiff demanded, and in this respect there was no material or prejudicial error.

Finding no reversible error the judgment of the Circuit Court will be affirmed.

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### Charles J. Off et al. v. Title G., A. & T. Co. et al.

1. *INJUNCTIONS—To Restrain the Collection of a Judgment.*—Where a party invokes the aid of a court of equity to restrain the collection of a judgment regular upon its face, he must show something more than defective service of summons upon the person of the defendant. He must also show either that the defendant had a good defense to the claim upon which the judgment was founded, or that the amount of the judgment is excessive.

2. *SAME—Application of the Rule.*—This rule applies not only where the application is made by the debtor claiming not to have been served with process, but also where the application is made by a creditor or other third party.

3. *VENUE—Waiver of the Right to be Sued in Defendant's County.*—The statute which prohibits the suing of a party out of the county where he resides or may be found, merely confers a privilege on him which he may avail himself of, if he chooses. If he does not avail himself of it by proper pleas in apt time, he will be regarded as having waived it.



4. **DAMAGES**—*When Not Allowed on Dissolution of Injunction.*—The rule requiring written suggestions to support an order for damages on the dissolution of an injunction has no application to a suit for the single purpose of enjoining the collection of a judgment.

5. **SAME**—*When Suggestions in Writing Are Unnecessary.*—When the sole and only purpose of a suit is to enjoin the collection of a judgment, it comes within the provisions of sections 4 to 8 of chapter 69, R. S., and the amount enjoined furnishes the extent of the claim for damages, and when that appears on the face of the bill, no written suggestions are necessary.

**Bill to Enjoin the Collection of a Judgment.**—Appeal from the Circuit Court of Tazewell County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

ARTHUR KEITHLEY, attorney for appellants.

JACK & TICHENOR, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court.

This is a bill in equity to enjoin the collection of a judgment and have it declared void for the sole reason that the means by which the court obtained jurisdiction of the defendant was the delivery of a summons upon its president in a foreign county.

Where a party invokes the aid of a court of equity to restrain the collection of a judgment regular upon its face, he must show something more than defective service of summons upon the person of the defendant. He must also show either that the defendant had a good defense to the claim upon which the judgment was founded, or that the amount of the judgment was excessive. It must appear that the judgment is unjust or oppressive. High on Injunctions, Sec. 125; Blackburn v. Bell, 91 Ill. 434; Thomas v. Mueller, 106 Ill. 36; Colson v. Leitch, 110 Ill. 504; Geraty v. Druiding, 44 Ill. App. 440.

This principle applies not only where the application is made by the debtor who claims that he was not served with process, but also where the application is made by a creditor or other third party. Hier v. Kaufman, 134 Ill. 215.

Because appellants' bill did not aver that there was no indebtedness on which to base the judgment in favor of the guaranty company, or that the judgment was excessive and unjust, or that there was a good defense to the whole or a part of the claim, the court properly sustained a demurrer to the bill.

We are also of the opinion that the service was sufficient to support the judgment when not questioned by plea to the jurisdiction. The statute which prohibits the suing of a party out of the county where he resided or may be found merely confers a privilege on him which he may avail himself of if he chooses. If he does not avail himself of it by proper plea in apt time, he will be regarded as having waived it. *Hardy v. Adams*, 46 Ill. 532; *Wallace v. Cox*, 71 Ill. 548; *Drake v. Drake*, 83 Ill. 526; *Callender v. Gates*, 45 Ill. App. 374.

It is contended that the court erred in assessing damages against appellants upon the dissolution of the injunction without suggestions or damages being filed. The rule requiring written suggestions to support an order for damages on the dissolution of an injunction has no application to this kind of a case. This was a suit to stop the collection of a judgment and for no other purpose, and comes within the provisions of sections 4 to 8 of chapter 69 of the Revised Statutes. Where an injunction to restrain the collection of a judgment is sought, the amount enjoined furnishes the extent of the claim for damages. That appears on the face of the bill, and consequently no written suggestions are necessary. *Schaffer v. Sutton*, 49 Ill. 506; *Forth v. The Town of Xenia*, 54 Ill. 210.

We see no merit in the technical objection to the order of the court in dismissing the bill at the instance of two of the three defendants and assessing damages while the case remained undisposed of as to the sheriff. He was not the principal defendant and if the bill was bad he was not bound to answer. A default against him would have been unavailing. Appellants did not offer to take any action against him and the objection is now made for the first time. Decree affirmed.

**J. Park McGee v. Eliza Johnson and David L. Johnson.**

1. **MASTER IN CHANCERY—*Weight of His Findings.***—The findings of a master in chancery who sees the witnesses and hears them testify, is entitled in this court to like consideration and weight as is to be attributed to the verdict of a jury.

2. **APPELLATE COURT—*Ability to Pass upon the Evidence.***—The Appellate Court is in as good position to pass upon the evidence and arrive at the proper conclusion and real intention of the parties as the chancellor who enters a decree but does not see or hear the witnesses.

**Bill to Have a Deed Declared a Mortgage.**—Appeal from the Circuit Court of Douglas County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

THOS. W. ROBERTS and ECKHART & MOORE, attorneys for appellant.

JOE H. WINKLER, attorney for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court. September 8, 1894, Eliza Johnson and David L. Johnson, the appellees, as complainants, filed in the Circuit Court of Douglas County, their bill in chancery against J. Park McGee, the appellant, as defendant, in which they charged that on October 25, 1887, they were indebted to the defendant in the sum of about \$300, and to secure the payment thereof, then executed and delivered to him their warranty deed of that date, conveying to him, by its terms, the absolute fee-simple title to a certain tract of land in Douglas county, then owned by them, it being understood and agreed between the respective parties to said deed that the defendant would reconvey said tract of land back to the complainants when they paid him said indebtedness; that complainants had paid defendant about all of said indebtedness, but he had refused to account with them for such payment, and to reconvey said tract of land as he had agreed to when said deed was made, although requested so to do by them; that

he had taken forcible possession of said land from them and claimed to own it in accordance with the express terms of said deed.

The bill prayed for an accounting between the parties thereto, and upon the ascertainment of the balance due from complainants upon said indebtedness, if any, and its payment, the court would decree that said deed was a mortgage, and order defendant to reconvey said land to complainants in accordance with the agreement of the parties made when the deed was executed and delivered. The defendant answered the bill and denied that the deed was given to secure an indebtedness between himself and complainants, but was made in accordance with the purchase made by him from them of the premises therein described, and the payment of the purchase money in accordance with the terms of the purchase; that he got possession of the land peaceably by his tenants when the deed was executed and delivered; he has been in the possession thereof ever since, and has made valuable and lasting improvements thereon.

At the May term, 1895, the court ordered the proceeding referred to the master in chancery to take and report the evidence, state his conclusions of the law and facts, and to state an account between the parties. The master took the evidence, reported the same to the court with his conclusions that the deed in question was made in pursuance of the purchase of the property therein described by the defendant, from the complainants, and the payment of the purchase price by him to them; and that there was no agreement made between the parties to the deed that it was made to secure any indebtedness between them, or that the defendant should at any time after it was executed, reconvey the land back to complainants; and the master recommended that the court dismiss the bill.

The complainants having excepted before the master to his conclusions on the law and facts as well as his recommendation to the court, and he having overruled same, they renewed their exceptions before the court.

At the April term, 1897, the court heard the proceeding

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on the pleadings, evidence reported by the master, his conclusions on the law and facts, and his recommendation to dismiss the bill; sustained complainant's exceptions, and entered an order finding the deed to be a mortgage, and again referred the proceeding to the master to state an account between the parties. The master stated the account and reported the same to the court; and at the April term, 1899, the court entered a decree finding the amount of the indebtedness, then due to defendant from complainants, which was secured by the deed as a mortgage, to be \$216.03, and decreed that defendant reconvey to complainants the land, upon their paying him said balance. The appellant prosecutes this appeal to reverse that decree, and urges as grounds therefor, that the finding and decree of the court is contrary to the evidence.

The evidence shows that the premises in question had been sold under a decree of court foreclosing a mortgage which complainants had given thereon, and the time for redemption therefrom had almost expired when the complainants made the deed in question, upon the defendant paying off the decree indebtedness against it, which was at the time released and satisfied, and amounted to about the then value of the land. No note or other evidence of indebtedness was given by complainants to the defendant for the money so paid, nor was there any memorandum made in writing, or any agreement that the defendant would reconvey the land to complainants upon their repaying him the amount so paid. The evidence is very conflicting as to whether or not there was a verbal agreement between the parties that the defendant was to reconvey the land to complainants upon their repaying him what he had paid. It shows, however, that the complainants remained in possession of said land from the time of making the deed until September, 1891, and during that time paid to defendant some money and some grain grown on the land, which they swear was as part payment of the said money paid by him to redeem the land, but which he swears was paid to him as rent for the land while they remained upon it as

his tenants. After complainants removed from the land, in September, 1891, defendant rented the land to tenants and received the rents therefrom, and has paid all the taxes on the land since the deed was made.

The disinterested witnesses on the trial testified to various statements made by both complainants and the defendant before and after the deed was made, which were at variance with their testimony given on the trial with reference to whether or not there was an oral agreement between the parties, by which the defendant promised to reconvey the land upon being repaid the money he advanced to redeem it, and which the respective parties denied making.

The master in chancery saw and heard the witnesses when they testified, while the chancellor who entered the decree, did not; so we are in as good position to pass upon the evidence and arrive at the real transaction and intention of the parties when this deed was executed, as he was. And "the finding of the master is entitled in this court to like consideration and weight as would be attributed to the verdict of the jury," as we said in *Rock Island Lumber Co. et al. v. E. T. Lister*, 80 Ill. App. 591; and it was so held in *Foster v. Swaback*, 58 Ill. App. 588.

The law allows the complainants to show by parol evidence that the deed in question, although absolute in form, was only intended by the parties thereto when it was executed, to convey the land in order to secure an indebtedness then existing or then created between them; yet such intention, to overcome the presumptions arising from the terms of such deeds, must be established by clear, satisfactory and convincing evidence. *Helm v. Boyd*, 124 Ill. 370; *Fisher et al. v. Green et al.*, 142 Ill. 81, and cases cited.

The evidence, when fully read and carefully considered, is not of that clear, satisfactory and convincing character that warrants us in believing that the parties to this deed intended, when it was executed, that it was only to secure the payment of the money paid by appellant for redeeming it, but rather causes us to believe that the deed, as its terms show, was made by appellees as an absolute conveyance of

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the land to appellant in consideration of his paying such redemption money, and promising them that they might remain on the land rent free for the remaining crop year of the year in which the deed was made, and would then rent it to them for some time, which was more favorable to them than to lose the land by their inability to otherwise redeem it.

Being of the opinion that the decree of the Circuit Court is against the evidence, and that it should have been in accordance with the finding and recommendation of the master, who saw and observed the witnesses, we reverse the same and remand the case to that court with directions to overrule complainants' exceptions to the findings and conclusions of the master made upon the evidence taken by him in pursuance of the order of the court first referring the case to him for that purpose, and to dismiss the bill for want of equity, at cost of complainants. Decree reversed and case remanded.

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A. B. Hoblit, Adm., v. The City of Bloomington.

1. *INTEREST—Liabilities of Cities.*—A city is not chargeable with interest on claims against it, in the absence of an express agreement, except where money is wrongfully obtained and illegally withheld.

2. *SAME—Where Money is Not Wrongfully Obtained and Illegally Withheld.*—Where money is lawfully collected by special assessment for a street improvement and paid over to the treasurer, the city is not liable to pay interest upon it, because it is withheld from the contractor who does the work.

*Assumpsit*, for money had and received. Error to the Circuit Court of McLean County; the Hon. JOHN H. MOFFETT, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

*Statement.*—This was an action of assumpsit by the plaintiff in error to recover interest on \$6,497.90, due his intestate on a contract for paving two streets in the city of

Bloomington, which had been collected by special assessment and wrongfully withheld by the city.

The paving work was completed and accepted in October, 1889. The collection of the special taxes, levied for the improvement, was completed in 1893. In the meantime the contractor, E. B. Steere, died. The administrator of his estate presented special tax vouchers for the money to the city treasurer on the 1st of September, 1893, and demanded payment. Payment was refused, under instructions from the city counsel, upon the ground of alleged defects in the paving work. After considerable caviling, \$4,252.57 was paid on May 23, 1894, and \$2,171.64 on November 14, 1894. After the last payment was made, plaintiff in error demanded interest on the entire amount from September 1, 1893, to May 23, 1894, and interest on \$2,171.64 from May 23, 1894, to November 14, 1894, which was refused. This suit followed. Upon a trial by the court, a jury being waived, judgment was rendered by the court in favor of the city.

A. E. DEMANGE, attorney for plaintiff in error.

WILLIAM R. BACH, attorney for defendant in error; SIGMUND LIVINGSTON, of counsel.

MR. JUSTICE HARKER delivered the opinion of the court.

As we view one of the questions involved in this controversy, its decision is conclusive of the case. Is a city liable for interest on money collected by special assessment for street improvement which it has wrongfully withheld from the contractor who did the work?

Plaintiff in error bases his claim for interest on that part of section 2, chapter 74, of the Revised Statutes, which provides that creditors shall be allowed interest at the rate of five per cent per annum "on money withheld by an unreasonable and vexatious delay of payment." The section does not apply to municipal corporations. Under the uniform holding of our Supreme Court, a city is not chargeable with



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interest on claims against it, in the absence of an express agreement, except where money is wrongfully obtained and illegally withheld by it. *City of Pekin v. Reynolds*, 31 Ill. 529; *City of Chicago v. The People ex rel., etc.*, 56 Ill. 327; *Vider v. City of Chicago*, 164 Ill. 354; *City of Peoria v. The Fruin Bambrick Construction Co.*, 169 Ill. 36; *City of Danville v. The Danville Water Co.*, 180 Ill. 235.

It is contended, however, that the above authorities do not apply for the reason that this suit is to recover interest on money oppressively withheld after demand. The oppressive or illegal withholding of the money does not constitute the exception made by the Supreme Court. There must also have been a wrongful obtaining of it. That the money in this case was lawfully collected and lawfully paid over to the city treasurer is not questioned.

It is unnecessary to express our views on the other points discussed. The city was not liable to pay interest, and the judgment is right. Judgment affirmed.

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1. **SHERIFFS**—*Duty Under the Act of June 16, 1887.*—The act of June 16, 1887, entitled "An act to secure the peace and good order of society, to quell riots or disturbances, to secure the execution of the laws, and to provide for special deputy sheriffs, and for calling out and using the military forces of the State for the preservation of the peace and the protection of property," vests in the sheriff the discretion to enroll as many deputies as may in his judgment be required, and such deputies are subject to his orders and liable to fine and imprisonment for a refusal to act when called upon.

2. **DEPUTIES**—*Not Affected by the Calling out of the Militia.*—The fact that the executive calls out a part of the military force of the State for the preservation of the peace in the same exigencies under which a special deputy is enrolled, and under which he is compelled to perform like services, furnishes no reason why he should not recover for the time served by him during which the military are called out.

3. **CONSTRUCTION OF STATUTES**—*The General Rule.*—In the construction of statutes, where the enumeration of a special class of subjects is followed by a general clause intended to embrace subjects not enu-

merated, the general clause will be construed to include only subjects that partake of the same nature as those mentioned in the special class.

4. *SAME—Construction of the Eight Hour Law.*—The subjects enumerated in the act making eight hours a legal day's work and to which eight hours shall apply, are all mechanical trades, arts and employments, and the general clause is, "other cases of labor and services by the day." The subjects embraced by the enumeration are limited, and consequently the general clause should also be limited to work and labor in the common and necessary industries of the people, and can not be extended to include the services of the constabulary of the State, whose duty it is to enforce the observance of the law, preserve the peace and protect property—a service involving in no proper significance, any element of work or labor in the common acceptance of those words, but involving the idea of vigilance and discretion, fortitude and courage.

5. *SAME—Application of the Eight Hour Law.*—The eight hour law has no application to a deputy sheriff appointed under the provisions of the act of June 16, 1887, entitled, "An act to secure the peace and good order of society, to quell riots or disturbances, to secure the execution of the laws and to provide for special deputy sheriffs, and for calling out and using the military forces of the State for the preservation of the peace and the protection of property."

6. *COUNTIES—Liability for Subsistence.*—Under the provisions of the act of June 16, 1887, a special deputy sheriff is entitled to subsistence while on duty, and if the county or sheriff fails to furnish or supply the same, and he is compelled to supply it himself, the county is liable to reimburse him.

*Assumpsit*, for compensation and subsistence while acting as a special deputy sheriff; the Hon. WILLIAM M. FARMER, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant, among others, was summoned and enrolled as a special deputy sheriff by the sheriff of Christian county under the provisions of the act of June 16, 1887, entitled "An act to secure the peace and good order of society, to quell riots or disturbances, to secure the execution of the laws, and to provide for special deputy sheriffs, and for calling out and using the military forces of the State for the preservation of the peace and the protection of the property," and this suit is brought by him to recover of the county for his services as such deputy sheriff, and for his subsistence

while on duty. Upon the trial, which was by jury, the appellant recovered a verdict for \$182, the same being for ninety-one days at \$2 per day, and after overruling his motion for a new trial the court gave judgment in his favor for that sum, to reverse which he prosecutes this appeal, and to effect a reversal contends, first, that he should have recovered under the eight hour law; second, that for all day and night service (twenty-four hours), he should have been allowed at least two days, and third, for subsistence while on duty. Cross-errors have been assigned by the appellee to the effect that the executive having called out a part of the military force of the State for the preservation of the peace in the same exigencies under which appellant was enrolled, the authority and service of the sheriff and his deputies were thereby superseded, and during such time of military intervention appellant should not recover.

The facts are, in substance, that during a strike among the workmen at Pana mines, appellant was appointed a special deputy sheriff and took the oath of office August 24, 1898, and served as such until December 4, 1898, having been actually employed ninety-one different days, thirty-three of which he served night and day, and the others he served either a full day or night of twelve hours. He performed his duties under the order of the sheriff, and while on duty provided his own subsistence, his meals having been carried to him by members of his own family, no other provision for subsistence having been made. From November 21st, to December 4th, a period of fifteen days, during the service of appellant, the military forces of the State, by proclamation of the governor, were present at Pana for the preservation of the peace.

The title of the eight hour law is: "An act making eight hours a legal day's work;" and it provides that eight hours of labor between the rising and setting of the sun, in all mechanical trades, arts and employments, and other cases of labor and service by the day, except in farm employments, shall be and constitute a legal day's work, where there is no special contract or agreement to the contrary. It is a

familiar rule in the construction of statutes that the enumeration of a special class of subjects, followed by a general clause intended to embrace subjects not enumerated, the general clause will be construed to include only subjects that partake of the same nature as those already mentioned. The subjects enumerated to which eight hours shall apply are all mechanical trades, arts and employments, and the general clause is, "other cases of labor and services by the day." The subjects embraced in the enumeration are limited, and consequently the general clause should also be limited to work and labor in the common and necessary industries of the people, and in no just sense could it be extended to include the services of the constabulary of the State, whose duty it is to enforce the observance of the law, preserve the peace, and protect property, a service involving in no proper significance any element of work or labor in the common acceptance of those words, but involves the idea of vigilance and discretion, fortitude and courage.

The title of the act is to make eight hours a legal days work, and it seems clear to us it was the legislative intent to apply the word merely to the usual industries of the State, for which wages are paid to those who work or labor therein. We are of the opinion the eight hour law has no application to a deputy sheriff appointed under the provisions of the act in question. Neither was appellant entitled to divide twenty-four hours continuous service so as to make two days. He was bound to serve as the exigencies of the services demanded, and that no doubt at times would require twenty-four or more hours continuous service, and at other times little or nothing might be required; at all events, such, generally, is the nature of service like this, which is nearly allied to military service, and all know the character of that in camp and field. Under the plain provisions of the statute appellant was entitled to subsistence while on duty, and if the county or sheriff failed, as they did, to furnish or supply the same, then appellant was, in the very nature of the case, compelled to supply it himself, and no reason can be perceived why the county is not liable to

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reasonably reimburse him for the subsistence so supplied. The court in substance instructed the jury that appellant could not recover for the subsistence supplied by himself and refused the instructions asked by him upon this point, which was error.

There is no merit in the cross-errors assigned by appellee, that because the executive called out the military force of the State for the preservation of the peace in the same exigencies under which appellant was compelled to perform a like service, he could not for such reason recover for the time covered by military intervention. In the first place the statute vested in the sheriff the discretion to enroll as many deputies as might in his judgment be required, and that such deputies should be subject to the orders of the sheriff, and should any person when summoned decline or refuse to act, the statute declares he shall be guilty of a misdemeanor and be fined not less than \$50, nor more than \$200, or be imprisoned in the county jail not to exceed three months. Appellant obeyed the orders of the sheriff, and thus complied with the requirements of the statute as in duty bound. He obeyed the orders of the sheriff, and thereby earned his compensation. If the sheriff was mistaken in judgment by retaining appellant in service, the latter ought not to be prejudiced thereby. He was in no wise privy to the calling out of the military forces, neither can it be said as a matter of law that the mere act of invoking military aid operated to relieve appellant from service as a deputy sheriff, or deprived the sheriff of his authority in this regard. There may have been the best of reasons for retaining him in that capacity to assist the sheriff in the discharge of his duties, for under the statute and the constitution it was the duty of the military to report to the civil officer, and act in strict subordination to civil authority, thereby clearly demonstrating that instead of diminishing the responsibilities of the sheriff, they were increased by the presence of the military forces.

For the error indicated the judgment of the Circuit Court will be reversed and the cause remanded.

**Edward Barry, Receiver, etc., v. Rebecca Downs et al.**

1. **BUILDING AND LOAN ASSOCIATIONS**—*The Rule of Accounting in Foreclosure Suits.*—The rule in such cases, to which this court is committed, is that members are chargeable with the money actually received by them, with legal interest thereon from the time it was received, and are entitled to credit for all interest and premium paid, and are chargeable with so much of the premium as was earned at the time the association passed into the hands of the receiver.

**Mortgage Foreclosure.**—Appeal from the Circuit Court of Edgar County; the Hon. HENRY VAN SELLAR, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

J. J. MORRISSEY, attorney for appellant.

DUNDAS & O'HAIR, attorney for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant was appointed receiver, June 6, 1898, of the Inter State Building and Loan Association, it then being insolvent. Appellees being the owners of two shares of stock of \$100 each in the association, gave their mortgage, September 20, 1890, to the association to secure an advance of \$200, and thereby agreed to pay \$1.20 each month as dues upon the shares of stock, \$1 each month as monthly interest at the rate of six per cent per annum upon \$200, and \$1.17 as monthly premiums. Appellant filed his bill in equity to foreclose such mortgage, which was answered, and the cause being at issue, was referred to the master, with directions as to the manner in which the account should be stated. The master took the evidence, reported his account to the court, to which appellant excepted, and upon the final hearing the court overruled appellant's exceptions to the master's report and entered a decree of foreclosure for \$35.72, to reverse which this appeal is prosecuted.

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The Circuit Court charged appellees with the amount of money received by them, with legal interest, from which it deducted the total amount of interest and premium installments paid by appellees. This was error. The rule in such cases, to which this court is committed, is that appellees are chargeable with the money actually received by them, with legal interest thereon from the time it was received, and are entitled to credit for all interest and premium paid, and are chargeable with so much of the premium as was earned at the time the society passed into the possession of the receiver. *Dooling v. Davis*, 84 Ill. App. 394, following *Sullivan v. Spaniol*, 78 Ill. App. 125. As no good purpose would be subserved by a discussion here of the reasons that led to the adoption of such rule, we refer to the cases cited for the same, being satisfied with the reasoning there pronounced.

The decree of the Circuit Court will be reversed and the cause remanded for further proceedings, consistent with the views herein expressed. Reversed and remanded.

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The People ex rel., etc., v. Rudolph Kuechler.

1. **PRACTICE—Release in Bastardy Proceedings.**—Where the defendant in a bastardy suit makes a motion to dismiss the proceedings upon the ground of a settlement with the complainant and a release from her, and she resists the motion, it is the duty of the court to deny the motion, make up an issue as required by law, and put the defendant upon trial, leaving him to plead the release, etc.

**Bastardy Proceedings.**—Error to the County Court of Scott County; the Hon. JAMES CALLANS, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded with directions. Opinion filed February 27, 1900.

T. J. PRIEST, State's Attorney, J. M. RIGGS and H. B. KELLEY, attorneys for plaintiff in error.

JAMES A. WARREN, attorney for defendant in error.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The record of this case shows that Fannie Loving, the relator, an unmarried woman residing in Scott county, made complaint to a justice of the peace of that county, charging that Rudolph Kuechler, the defendant in error, was the father of her unborn child, which by law would be deemed a bastard. The justice issued a warrant against the defendant, under which he was arrested and brought forthwith before him, and the relator was examined touching the charge thus made. This examination convinced the justice that good cause appeared, so he bound the defendant with sufficient security to appear before the County Court of Scott County to answer the charge, and returned the warrant and bond to that court. Afterward the defendant presented to the County Court of Scott County his motion to dismiss the bastardy proceeding thus instituted against him, on the grounds that the same had been settled by him with the relator, and the settlement had been approved by that court, as per copy of settlement on file in that court. The plaintiff presented a cross-motion to strike from the files defendant's motion to dismiss, "because if the matter he sets up is a valid defense, it should be set up on trial in bar, and can not be set up on motion;" but the court overruled the cross-motion and plaintiff excepted. At the request of the plaintiff the court then allowed a showing to be made against the motion to dismiss, and the affidavits of the relator, of her mother, of her uncle, and of her grandfather, were presented to the court, by which it appeared that the so-called settlement had been obtained by the defendant with the relator against her will and consent, and while she was under the age of eighteen years, and that the relator had tendered all the money paid her for the release by the defendant (the same being \$50) back to him but he refused it, and she had paid it to the clerk of that court for his use; and that the defendant was guilty as charged. In rebuttal the defendant introduced the justice of the peace before whom the preliminary hearing in the bastardy proceedings was had, as a witness, who testified that the relator,



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at that hearing, testified that she would be eighteen years old in February, 1899. There was also introduced in evidence by the plaintiff, a certified copy of a return of birth as shown by register of births on file in the office of the clerk of County Court of Piatt County, Illinois, by which it appeared that one W. M. Harsha, M. D., under date of March 1, 1881, certified that on February 3, 1881, a female child was born at Cerro Gordo, Illinois, whose mother's name was Laura Alice Loving; father's name was William Loving; the name of the medical attendant at such birth was W. H. Harsha, and that said child was the fourth child of the mother. Attached to said motion and made a part thereof, was a writing as follows:

"STATE OF ILLINOIS, } In the County Court, July term,  
Scott County. } ss. A. D. 1899.

THE PEOPLE OF THE STATE OF ILLINOIS }  
v. } Bastardy.  
RUDOLPH KUECHLER. }

I, Fannie Loving, the prosecuting witness in above entitled cause, and a resident of the county and State aforesaid, have this day released the defendant, the reputed father of my child, from all legal liability on account of such bastardy, upon the release being approved by the judge of the County Court of said county. The terms of such release being fifty dollars in cash paid by the defendant in this case, which sum I hereby acknowledge receipt of, and that I am over eighteen years of age, and understand this settlement fully, subject to approval of county judge.

Dated this 29th day of June, A. D. 1899.

FANNIE LOVING, Mother of Bastard Child.

Witness: FRED CALLANS.

This day came the above parties, the prosecuting witness and the defendant, and the court finds that both parties are of lawful age and fully competent to settle the above cause; and the court further finds that said settlement was fully made without undue influence on the part of the defendant, and said settlement is now by the court approved.

Dated this 29th day of June, A. D. 1899.

JAMES CALLANS,  
County Judge."

The County Court then entered an order sustaining defendant's motion dismissing the bastardy proceeding,

to which plaintiff excepted. To reverse that order the plaintiff brings that proceeding to this court by writ of error, and insists that the County Court erred in dismissing the proceeding without putting the defendant upon trial on the merits.

It is very clear that after the preliminary hearing before the justice, and the binding of the defendant over by him to the County Court upon the charge of bastardy preferred by the relator, and the filing of the warrant and bond with the clerk of that court, that under the provisions of section four of our bastardy act, that court should have caused an issue to be made up, whether the defendant charged is the real father of the child or not, which issue should have been tried by a jury, unless a jury was waived. And while, by the provisions of section eighteen of said act, the mother of a bastard child, before or after its birth, may release the reputed father of such child from all legal liability on account of such bastardy, upon such terms as may be consented to in writing by the judge of the County Court of the county in which such mother resides, yet such release, in order to bar the proceedings, must be fairly obtained by the defendant, or if the mother of the child was under the age of eighteen years when such release was obtained, then in that case the same may be avoided like any other contract made by a minor.

Therefore, when the defendant moved to dismiss the bastardy proceeding pending against him on the ground that the same had been settled by a release obtained by him from the mother of the bastard child, and the plaintiff gave the court to understand by the affidavits presented in resistance of that motion, that fraud was practiced upon such mother by the defendant, when he obtained such release, and also that the mother was a minor when she executed such release, and for that reason desired to avoid the same, and had offered to pay back the money received therefor, that court should have overruled the motion to dismiss, and compelled the defendant to go to trial upon the issue required to be made by section four of said act, and upon such trial

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the defendant should be permitted, in addition to the defense of not guilty, to show, if he can, that he had obtained a valid release from the mother of the child as a bar to the proceedings, permitting the plaintiff also to avoid the bar of such release by showing, if such is the fact, that such release was procured by fraud, misrepresentation, or duress practiced upon such mother by the defendant or his agents; that being the course pursued in *Gurley v. The People*, 31 Ill. App. 465. Likewise the court should allow the plaintiff to avoid the bar of such release by showing on the trial, if it is a fact, that Fannie Loving, the mother of the child, was under the age of eighteen years when she executed such release, and that she had tendered back to the defendant before the trial, all the money she had received from him for such release. For the error committed by the County Court in entering an order in this proceeding sustaining the motion of the defendant, and dismissing the proceeding, we reverse that order and remand the proceeding to that court with directions to overrule that motion and then proceed herein in accordance with law and justice, and not inconsistent with the views expressed in this opinion. Reversed and remanded with directions.

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### Henry S. Earl v. Rachael E. Earl et al.

1. **INNOCENT GRANTEEES**—*Who Are Not*.—Those who fail to place their deeds upon record are not innocent grantees as to those whom the grantor has induced to give him credit upon his claimed ownership of the property.

2. **DEBTOR AND CREDITOR**—*Right to Rely upon the Record*.—Creditors have a right to rely upon the condition of the title as shown by the record, and upon the representations of a party that he is the owner, and in the absence of evidence indicating knowledge of another's title, they have the legal right to give credit to the former under the belief that he is the actual owner.

3. **HUSBAND AND WIFE**—*Right of Married Woman to Contract with Her Husband*.—Under the laws of this State a married woman has a right to contract with her husband, and the wife has a right to receive

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payment of her debt the same as a *feme sole*, and a creditor has a right to pay any debt in full to the exclusion of other claims, even if such creditor is his wife.

4. *NEGLIGENCE—When One of Two Innocent Parties Must Suffer.*—Where loss must ensue by reason of negligence, the person who is in fault should suffer the loss.

5. *COSTS—In Chancery in the Discretion of the Court.*—In chancery suits, costs are in the discretion of the chancellor.

**Bill to Set Aside a Deed.**—Appeal from the Circuit Court of Ford County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

M. H. CLOUD and KERR & LINDLEY, attorneys for appellant.

SAMPLE & MORRISSEY and W. S. MOFFETT, attorneys for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant filed his bill in equity against appellees, wife and husband, to set aside two deeds of conveyance of real estate by the husband to the wife, on the ground, as alleged, that they were fraudulent as to creditors, and to subject the property so conveyed to the payment of a judgment and execution in favor of appellant against Edwin E. Earl, the husband of appellee Rachael E. Earl. The husband, failing to answer the bill, was defaulted, but the wife filed her answer and issues were thus formed. The court upon the hearing found that the conveyance of an undivided one-half in 52½ acres of land in Woodford county was fraudulent, and decreed that such conveyance be set aside, and found the conveyance of the Paxton property, upon which appellees resided with their family, was not fraudulent, and decreed that as to the last mentioned property the bill be dismissed for want of equity, and taxed two-thirds of the cost to appellant, from which decree he appeals to this court, and to effect reversal of such part thereof as is adverse to him, assigns and argues various alleged errors.

## Earl v. Earl.

Appellee Rachael E. Earl, has assigned cross-errors upon the record whereby she seeks reversal of such part of the decree as subjects the Woodford county land to the payment of the judgment in favor of appellant.

The material facts established by the evidence, necessary to be stated in the decision of the case, are in substance these: Appellant and appellee Edwin F. Earl are brothers, the latter having married the appellee Rachael E. Earl, in 1863, and took up their residence in Paxton in 1869. In 1873 the father of Mrs. Earl gave her \$1,000 to be invested in a home for her, with which property was purchased, the title for some reason, not wholly clear, having been taken in the husband's name, but in 1875 or the year before, the title was changed to the wife; the deed, however, was not recorded. This property was sold in 1883, when the Earl family went West, returning in 1884, when the property consisting of the home now in controversy was purchased for \$1,800, from which two lots were later sold for \$1,000, and the property improved in 1887 at an expense of \$4,000, and in which they have continued to reside. The title to this property was in the husband's name. Mrs. Earl received \$10,213 from the sale of land in Woodford county, the title to which she derived from her father, the greater part of which was invested in land in Minnesota. In 1891 Edwin F. Earl bought of his brother, appellant, 200 acres of land in Ford county for \$7,600, for which he paid cash except \$1,603.05, for which he gave his note, and at this time he seemed to be possessed of financial ability and credit, in his own right and upon his own personal worth. Appellant was also in good financial circumstances, and the two brothers variously dealt with each other, and in addition to the balance due for the land, represented by the note before mentioned, Edwin F. Earl owed appellant \$388.79 balance, money lent in 1891, \$853 for interest upon indebtedness of several years standing and \$247.70 for interest accrued on the note first above mentioned, for all of which sums appellant held his brother's personal notes, and the same being unpaid, judgment was recovered upon them for \$3,355.88,

December 17, 1897, upon which execution issued, being the same described in the bill. In 1887, the wife being dissatisfied with the title of the home remaining in her husband, urged him to make her a deed, in which she persisted from time to time, and was joined therein by other members of the family, when in 1892, he did so, and it was delivered to the wife, which she put away without recording, and the husband afterward, without the knowledge or consent of the wife, took and destroyed it. After this the husband sustained serious financial loss in option deals, in which it is alleged appellant was also interested, and while it is probably true that he was so interested, it is proper to infer from the evidence that he authorized his brother to deal in actual property only, and not in margins, and that he understood the former to be the nature of the business while it was yet in hand. At the time Edwin F. Earl owned lands in Minnesota and in Ford county and was in good financial circumstances, but to meet a part of his losses desired to mortgage some of his lands, which was done, his wife joining in the mortgage, June 13, 1892, at which time the husband gave the deed to the home property which he later destroyed. In 1894, appellees joined in a deed to appellant for several hundred acres of Minnesota land. Mrs. Earl claims, and so testified, that she understood from appellant and her husband at that time, that the conveyance of that land was in full settlement of the debts due to appellant, and she was induced thereby to sign the deed, and while it is clear from all the evidence in the case that no such settlement was thereby effected, the circumstances may be looked to determining the question of intentional fraud, as affecting Mrs. Earl.

The title to the fifty-two and one-half acres in Woodford county came jointly to husband and wife by the will of the father of the latter, who died in 1890, and in September, 1894, the husband tried to sell his interest therein to Wheeler for \$1,000, to raise money to pay a \$500 note at Hoopston bank. Mrs. Earl bought it herself, paid \$500 in cash, and gave to her husband her note for \$500, payable when the

land was sold; and Edwin F. Earl, for such consideration, conveyed his interest in that land to his wife by deed dated September 12, 1894, which is the same deed the decree of the court set aside as fraudulent, and for which the cross-errors have been assigned by Rachael E. Earl. Edwin F. Earl, at request of appellant, made several property statements designed to procure a further extension of time upon the indebtedness due to his brother. These statements were made in writing, January 12, 1893, January 4, 1894, and February 8, 1896, in each of which the residence was scheduled at a value of \$7,000, and as his own property; and appellant testified he extended time upon the indebtedness on the strength of these statements. The deed of conveyance of the homestead property was recorded January 14, 1896. From these facts and others established by the evidence which we do not think material to state, it is argued by appellant that so much of the decree that is adverse to him is unsupported and should be reversed, and the appellee makes like insistence upon her cross-errors as to such part of the decree as is adverse to her.

Counsel for appellant in the opening pages of their printed argument anticipate the position of counsel for appellee and discuss the subject and principles of a resulting trust as applied to the relations of appellees in respect to the homestead property. We are not inclined to the view that such a question arises in the case. It seems to us it could only properly arise if the wife was attempting to enforce her right to the property in a direct proceeding against the husband, but no such phase of the case is here presented; on the contrary, if such trust ever existed, it has been executed by the deed of conveyance and thereby extinguished.

Was the conveyance of the homestead property to the wife fraudulent? The original consideration for this moved as a gift by the father to his daughter, and the latter did all she could reasonably do to secure the title in her own name, and at last accomplished her purpose, and at no time was she consenting to his use of the property to obtain

credit. But if she was negligent in omitting to record the first deed that was later destroyed by her husband, and if it can be justly found from the evidence that appellant was in any wise prejudiced by this circumstance, or in any manner misled by it, we should not hesitate to condemn the conveyance as fraudulent—not fraudulent in fact, but in law. While it is true that all the indebtedness represented by the judgment was incurred prior to 1892, and prior to certain property statements made by Edwin F. Earl to appellant, listing the homestead property as his own, valued at \$7,000, still it is also true that appellant was induced to forbear this indebtedness, as he claims, and which, we have no doubt is true, by reason of the holdings represented in such statements. The first deed to the homestead property was laid aside without record. The deed of November 16, 1895, was withheld from record until January 14, 1896, thereby giving color to the truth of the property statements. It has been held that the husband may not be allowed to retain the actual possession of real estate and have the records disclose title in himself, and then by claiming title in himself obtain credit, and then afterward say that he conveyed it to his wife and children, and that it shall not therefore be subject to the payment of the debt. While the innocent grantees in a deed are not concluded by the acts and declarations of their grantors, those who fail to place their deed upon record are not innocent grantees as to those whom he has induced to give him credit upon his claimed ownership of the property. At the time of the conveyance by the husband it became her duty to give such notice as the law requires to all persons that he no longer held any title. The creditors had a right to rely upon the condition of the title as shown by the record, and upon the representations of the husband that he was the owner, and in the absence of evidence indicating any knowledge of appellee's title, appellant had the legal right to give credit to the husband under the belief that he was the actual owner. *Blackman v. Preston Bros.*, 123 Ill. 381; *Smith v. Willard*, 174 Ill. 538. Had the deed



to Mrs. Earl been recorded when it was first given in 1892, we have little doubt it would be valid against the present claim of appellant. Under the laws of this State married women have a right to contract with their husbands and the wife has a right to receive payment of her debt the same as a *feme sole*, and a creditor has a right to pay any debt in full to the exclusion of other claims, even if such creditor is his wife. *Cartwright v. Cartwright*, 68 Ill. App. 74. According to the evidence the wife was a *bona fide* creditor of the husband; he was indebted to the wife, both legally and equitably, for the price of the homestead, and it was just and valid for him to execute and deliver a conveyance thereof to her. It is supported by a sufficient consideration, and only by neglect to record it, and thereby give the notice of her claim that the law requires that the husband no longer held any title, is appellee in this case prevented from holding the property against the claim of appellant, who had the right to rely (which we think he did) upon the condition of the title as shown by the record and upon the representations of the husband contained in the property statements that he was the owner. Where loss must ensue by reason of negligence the person who is in fault should suffer the loss. If appellant had been apprised of the fact that his brother did not own the homestead in 1892, it is but reasonable to infer he would sooner have proceeded to enforce collection of his demand, and had he done so it is probable it would have been paid. It is true appellees still have the right of homestead in this property, and it follows that before it can be sold, appellant will be required to comply with the statute in such cases.

We are next brought to consider the cross-errors assigned by appellee, Rachael E. Earl, and determine the validity of the conveyance of the Woodford county land. There is no evidence of intentional fraud in respect to this conveyance. The purpose of the conveyance was to enable the husband to pay a debt, which he did, and that was a laudable and legitimate object. It is contended in support of the decree

in this respect that because of inadequate price, and the nature of the note given by Mrs. Earl, that the conveyance is fraudulent. We are not disposed to hold the price so far inadequate as to constitute a badge of fraud. A fair consideration of the evidence would seem to make the cash value of the fifty-two and one-half acres \$2,500, which would be \$1,250 for the half interest, purchased for \$1,000.

Appellee Rachael E. Earl paid \$500 in cash to her husband, and gave her note for the balance, payable when the land was sold. The evidence shows that she has made no effort to sell the land, and has no intention of doing so, which we think renders the note payable on demand, and the fact, if it be such, that the husband has no intention of enforcing it against his wife, is wholly ineffective against its validity, for it could be easily reached by garnishment at the suit of a judgment creditor of the husband, there being no question regarding the solvency of Mrs. Earl.

Appellant has assigned for error that the court adjudged two-thirds of the costs against him. In chancery, costs are in the discretion of the chancellor, and we can not say such discretion has been abused herein. Our conclusion, therefore, is that the decree of the Circuit Court is erroneous *in toto*, and such part thereof as affects the homestead property will be reversed for the error indicated, included in the errors assigned by appellant, and the residue of the decree will be reversed upon the cross-errors assigned by the appellee Rachael E. Earl, each party to pay one-half the costs of this court, and the cause will be remanded for further proceedings not inconsistent with the views herein expressed. Reversed and remanded.

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### F. L. Capps v. James E. Lord.

1. NOTICE—*Agents—Persons Under Disability.*—The fact that a party who falsely claims to be working for himself instead of for another, is under disability and legally incapable of transacting business, is sufficient to put persons upon inquiry, which if pursued would have exposed the claim as a deception.

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**Replevin.**—Appeal from the Circuit Court of Christian County; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

FRANK P. DRENNAN, attorney for appellant.

JAMES B. RICKS and CHARLES A. PRATER, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant brought action of replevin before a justice of the peace for two wagons, cant-hooks and chains, and thirty-six walnut logs, and the case having been appealed to the Circuit Court a trial by jury resulted in a verdict for appellee for the logs, and judgment having been entered accordingly, this appeal resulted, and we are asked to reverse such judgment for reasons urged in the argument.

Appellant hired Dills to contract for the purchase of logs for him, authorized him to measure them and report the quantity and name of the seller to him, after which the appellant would pay the vendor direct for the logs by check. The logs in controversy were so purchased of Jones and paid for by appellant. Appellant then hired Wilson to haul them to the station, the latter to furnish his own teams, appellant furnishing the wagons and other necessary apparatus. Wilson hauled the logs as employed to do by appellant. During this time Dills informed appellee that he, Dills, owned the teams and wagons, and that he was buying the logs for himself; that he was a drunkard and for such reason appellant was his conservator, and as such handled the money and checks. Because of this information, appellee gave Dills credit at his livery stable for the feed for the teams, and the bill not having been paid, sued out an attachment against Dills, and caused it to be levied upon the wagons and logs. Whereupon appellant brought this suit.

It is contended in support of the verdict that Dills failing

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to disclose his agency, by his representations to appellee, appellant is estopped to deny that Dills owned the property. We do not think this question arises upon the facts of the case. If Dills' representations were true he was under disability and legally incapable to transact business, and no agency would be involved.

The information to appellee that appellant was Dills' conservator, untrue as it was, was sufficient to put appellee upon inquiry, which, if pursued, would have led to the truth. The verdict being against the evidence, the judgment of the Circuit Court will be reversed and the cause remanded for a new trial.

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### Henry Myers v. Van Norman, Shattuck, Paxson & Co.

1. BURDEN OF PROOF—*Replevin of Mortgaged Property*.—In replevin of mortgaged property the burden is upon the plaintiff to show by the evidence that the property seized upon the writ of replevin is covered by the mortgage.

*Replevin*.—Appeal from the Circuit Court of McDonough County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

SWITZER & MELOAN, attorneys for appellant.

PONTIOUS & PONTIOUS, attorneys for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Elmer Hire executed, acknowledged and delivered to appellees a chattel mortgage upon twenty head of calves and other cattle described, including twenty-six cows, "with their increase," and during the lien of such mortgage appellant purchased of Hire twenty-eight calves, twenty-two from Hire's farm and six from Boyd's sold by Hire, whereupon appellant brought this suit in replevin for twenty-three head of calves, and recovered verdict and judgment, to

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C. & A. R. R. Co. v. Swadener.

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reverse which appellant appeals to this court, and alleges the verdict is not supported by the evidence.

The burden of proofs was upon the plaintiffs to show by the evidence that the calves seized upon the writ of replevin were covered by the mortgage. The property was purchased by Hire of appellees, in Chicago, and shipped to his farm in McDonough county, and the evidence shows that nineteen calves were taken to the farm in one place, and three or four crippled ones were also hauled out, and a part of them died, leaving not less than seventeen. Appellant testified seven head of twenty-eight he purchased died, but none of these were of the number taken from Boyd's. There was no evidence that there was increase of calves after the execution of the mortgage, nor that Hire had purchased or owned calves from other sources, and so the state of the evidence in the record leaves it wholly to presumption or conjecture whether more than seventeen of the calves purchased by appellant were covered by the mortgage, and the recovery being for twenty-three, it is therefore apparent that the rule of the law above stated as to the burden of proof was not fulfilled as regards the number of calves in excess of seventeen, and for such reason the judgment of the Circuit Court will be reversed and the cause remanded for a new trial. Reversed and remanded.

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Chicago & Alton R. R. Co. v. H. A. Swadener.

1. DAMAGES—When \$300 is Excessive.—A person attempted to ride upon a freight train from Williamsville to Springfield without a ticket; the conductor told him that he must procure a ticket at Sherman, an intermediate station, to Springfield, and also one back to Williamsville. He left the train at Sherman; he did not buy a ticket to Springfield and refused to buy one back to Williamsville, after being repeatedly requested so to do. As he started up the track, in a different direction, the conductor halted him and snatched his valise from him with the remark, "You are trying to beat me out of a fare from Williamsville to Sherman and you can't do it." A verdict of \$300 was held to be grossly excessive.

**Action in Case.**—Assault. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

PATTON, HAMILTON & PATTON, attorneys for appellant.

JAMES E. DOWLING and ROBERT H. PATTON, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellee recovered a judgment of \$300 against appellant in a suit for damages for an alleged assault of the conductor of a freight train on which appellee had taken passage.

From the evidence in the record, it appears that appellee desired to take passage on appellant's railroad from Williamsville to Springfield. He entered the caboose of a freight train at Williamsville without a ticket. He claims that he did not procure a ticket because he appeared three times at the window of the ticket-office and found no agent there from whom to buy a ticket. When he tendered cash fare to the conductor he was told by him that he did not have a cash schedule and that he (appellee) should procure, at the next station, Sherman, a ticket from Sherman to Springfield, and also one from Sherman to Williamsville, and he would thereby save the extra charge of ten cents imposed upon a passenger without a ticket. Appellee took back the money handed to the conductor, and taking his valise, left the train at Sherman. He did not buy a ticket to Springfield, however, and refused to buy one to Williamsville, after being repeatedly requested so to do. When he started up the track, in a different direction from the depot, the conductor halted him and snatched his valise from him with the remark, "You are trying to beat me out of a fare from Williamsville to Sherman, and you can't do it." The valise has never been returned to appellee.

The verdict of the jury is not justified by the evidence. The damages claimed in the declaration are for the wrong-

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ful taking of the valise and the assault at Sherman. If appellee left the train at Sherman with no intention of returning, he ceased to be a passenger, and appellant was not liable for an assault of the conductor. If his intention was to return, after buying a ticket to Springfield, his relation as passenger continued; but the damages awarded by the jury are grossly excessive. If liable at all, appellant is liable only for the value of the grip taken. Appellee testified that the conductor pushed him against a truck and injured him. He was the only witness who testified to any such act of violence. He is squarely contradicted by two of his own witnesses and every other witness testifying on that point.

It is contended that appellee is entitled to the damages awarded because of the humiliation to which he was subjected. The conduct of appellee does not impress us with the idea that he was capable of a very deep sense of humiliation; but if he was humiliated, it was due to his own stubbornness rather than to any fault of the conductor.

The judgment will be reversed and the cause remanded.

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**Mark Barr v. The City of Paris.**

1. **VERDICTS** — *When Properly Directed for the Defendant.*— Although there may be evidence to support the plaintiff's case, yet when it is so far insufficient to support a verdict in his favor that the same, if returned, must be set aside, the court may properly direct a verdict for the defendant.

**Action in Case.**— Appeal from the Circuit Court of Edgar County; the Hon. HENRY VAN SELLER, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

DUNDAS & O'HAIR, attorneys for appellant.

J. E. DYAS, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case by appellant against appellee to recover for the loss of a horse alleged to have been injured in consequence of the negligence of appellee in maintaining in its city limits an improperly constructed sidewalk at the entrance of an alley.

The trial was by jury, and at the close of the evidence for appellant the court directed a verdict for the appellee, and after overruling a motion for a new trial gave judgment accordingly; to reverse which the appellant prosecutes this appeal, and urges as grounds therefor that the court improperly directed such verdict.

The evidence shows that appellant was engaged in hauling and delivering cord-wood in the city of Paris, and in so doing used an alley in that city, which had its entrance from the principal street, opposite the public square. Along the street opposite the commencement of the alley a sidewalk has been constructed of flagstones, which by use had become worn somewhat smooth; and while appellant was attempting to cross this sidewalk, with a wagon heavily loaded with wood, and go into the alley from the street, by reason of the crossing being somewhat inclined, one of his horses pulling the load slipped and fell, and was thereby injured, from which injuries it is said to have died. The appellant testified he knew the condition of the sidewalk at this crossing and did not consider it safe, and the evidence clearly shows, and it is a matter of common knowledge and observation, that sidewalks are constructed along streets opposite the entrance to alleys; sometimes these places have aprons or inclines leading from the street to the sidewalk and into the mouth of the alleys, and where they do not have such inclines or aprons, and the sidewalks are somewhat higher than the surface of the street or mouth of the alley, the crossings over the sidewalk into the alleys are oval shape, and to cross them with a team, the owners thereof assume the risk of accident from the team slipping when going over them; especially as in the case at bar, where the condition is known by the



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owner of the team attempting to cross, and where the evidence shows the crossing is constructed as such usually are.

Therefore we think the court properly directed the verdict for appellee, and will affirm the judgment. Judgment affirmed.

**Lou Burke, W. E. Burke and D. C. Miller v. U. S. Express Co.**

87	505
894	29
87	505
106	572
87	505
e113	4184
e114	4554

1. **COMMON CARRIERS—Liability in Respect to Live Stock.**—In transporting live stock, a carrier is bound to furnish cars of sufficient strength, and skillful employes, and to exercise that degree of care which the nature of the property requires, but he is not an insurer of the animals against injuries or death caused by their nature, which can not be guarded against by foresight and vigilance.

2. **SAME—Transportation of Animals.**—In the transportation of live freight, the carrier, in the absence of negligence, is relieved from responsibility for such injuries as occur from or in consequence of the vitality of such freight. He does not warrant live freight against the consequences of their own vitality.

3. **SAME—How Relieved from Liability.**—A common carrier is relieved from liability if he can show that he has provided all reasonable means of transportation, and exercised that degree of care which the nature of the property requires.

4. **SAME—How Far an Insurer.**—A common carrier is an insurer for the safe delivery of live stock, and as such is answerable for every loss which can not be attributed to the act of God, public enemies, or to the vices of the animals themselves, and, in the case of loss resulting from such causes, the burden is upon the carrier to show his exemption from liability.

5. **SAME—Duty upon Delivery of Live Stock in Good Condition.**—The proof of delivery to the carrier of stock in live and good condition, and its injury or death while in the custody of the carrier, makes a *prima facie* case against the carrier, which may be rebutted by evidence that it provided all suitable means of transportation, and exercised that degree of care which the nature of the property required.

**Action in Case.**—Loss of live stock shipped by express. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

F. Y. HAMILTON and WELTY & STERLING, attorneys for appellants.

CHARLES L. CAPEN, attorney for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Originally appellants sued appellee in assumpsit, and subsequently by leave of the court changed the form of action to case for the loss of a Poland China hog shipped to be carried by appellee from Vermilion, S. D., to Bloomington, Ill. The trial was by jury, and resulted in a verdict and judgment against appellants, from which they bring this appeal, the error chiefly argued by which a reversal of the judgment is sought, being that the court refused proper instructions requested by appellants, and misdirected the jury in its instructions given at the request of appellee.

By stipulation of the parties in open court the case was tried upon the two additional counts, in case, of the declaration, which are, in substance, as follows: First count alleges defendant was, on the 16th of February, 1896, operating a certain line of cars, known as express cars, from Vermilion, South Dakota, to Bloomington, Illinois, for the common carriage of goods for hire; that the plaintiffs on said date, at Vermilion, South Dakota, delivered to the defendant one Poland China boar (crated), named "King Price," of the value of \$500, said hog being then in good condition, to be safely and securely carried to Bloomington, Illinois, and there to be safely and securely delivered for certain reward; that the defendant did not safely and securely carry said hog and deliver the same in good, live condition to the plaintiffs, but by the negligence of defendants permitted the said boar to be overheated in the car, and so treated in its transportation from Vermilion, South Dakota, to Bloomington, Illinois, that the said boar died while in the possession of defendant company.

Second additional count alleges defendant was possessed of and operating an express business as a common carrier, between Vermilion, South Dakota, to Bloomington, Illinois, and on the 16th day of February, 1898, the plaintiffs delivered to the defendant and the defendant then and there received of

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Burke v. U. S. Express Co.

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the plaintiffs one Poland China boar (crated), named "King Price," which animal so owned by the plaintiffs was of the value of \$500, to be safely and securely carried by the defendant to Bloomington, Illinois; that the defendant did not safely and securely carry the said Poland China boar to Bloomington, Illinois, and deliver the same to plaintiffs in good, live condition, but by the negligence of the defendant said animal became overheated and then was placed in a cold draught, from the effects of which said boar died, and was wholly lost.

It appears by the evidence that the hog was owned jointly by appellants, one-half interest by appellant Miller, and the other half by the Burkes, and was as contended, properly crated and delivered in live and good condition to appellee February 16, 1898, at Vermilion, South Dakota, to be carried to Bloomington, Illinois. The hog died *en route* in an express car of appellee, and its carcass was delivered at Bloomington, Illinois, February 18, 1898. In the view we have of the case it will not be necessary to discuss the evidence or what it proves. It is proper for us to say, however, that it was contended on the trial and the same is renewed in this court, on the part of appellants, that the evidence tended to show negligence on the part of appellee, in consequence of which the hog died, and by the appellee that the animal died either in consequence of improper crating, or by its nature, or the consequence of its own vitality.

The appellants requested the court to instruct the jury in substance that as a common carrier appellee was bound to carry live stock delivered to it, and deliver the same in good condition to the consignee, and on failure to do so, is liable for the loss or damage to the same, unless it proves such loss was occasioned by the act of God, the public enemy or because of vice inherent in the animal itself, but the court refused to so instruct the jury, but did direct the jury at request of appellee, in effect, that the carrier was only bound to use ordinary care, and unless appellants had proved by a preponderance of the evidence that the death of the hog was caused by want of ordinary care, the verdict should be for appellee. We are of the opinion the correct

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rule in respect to a carrier's liability in respect to live stock, is stated in *I. & St. L. R. R. Co. v. Jurey*, 8 Ill. App. 160, to the effect that "the carrier is bound to furnish cars of sufficient strength, skillful employes, and to exercise that degree of care which the nature of the property requires, but he is not an insurer of animals against injuries or death caused by their nature, which could not be guarded against by foresight and vigilance. In the transportation of animals, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur from or in consequence of the vitality of the freight. He does not warrant live freight against the consequences of their own vitality. *Hutchinson on Carriers*, Sec. 218; *Wharton on Neg.* 616. And he is relieved from liability if he can show that he has provided all reasonable means of transportation and exercised that degree of care which the nature of the property requires. *Cragin v. Railroad Co.*, 51 N. Y. 61."

Also, in *C. & O. Ry. Co. v. Radbourne*, 52 Ill. App. 203, which was a case for negligence in the carriage of live stock, the court held that under a count charging negligence generally, in that the defendant failed to carry the horses safely according to its duty as a common carrier, the particular act of negligence that produced the failure is immaterial; the failure to carry safely is itself *prima facie* a substantive and efficient cause of action; plaintiff is not required to prove or allege the particular circumstances of the loss or injury; citing *Great Western R. R. Co. v. McDonald*, 18 Ill. 174.

From these decisions, and the authorities upon which they are based, it would seem that the true rule applicable to such cases is, that a common carrier is an insurer for safe delivery of live stock, and as such answerable for every loss which can not be attributed to the act of God, the public enemy, or the nature or proper vices of the animals themselves, and, as in the case of loss by the act of God or public enemy, the burden is upon the carrier to show exemption from liability, so also it is in the case of loss or death resulting from the nature or vice of the animal. In

other words the proof of delivery to the carrier of stock, in live and good condition, and its injury or death while in the custody of the carrier, makes a *prima facie* case against it, which may be rebutted by evidence that it provided all suitable means of transportation, and exercised that degree of care which the nature of the property required. Tested by the authorities we have cited, and which in our opinion announce the correct rule, the Circuit Court erred in its rulings upon the instruction in this respect.

In its instructions the court also told the jury that unless the plaintiffs proved by a preponderance of the evidence that the death of the hog was caused by the negligence of the defendant in permitting it to become overheated, or that after permitting it to become overheated, the defendant then placed it in a cold draught in the car, the plaintiffs can not recover. Besides being subject to the objections we have mentioned to the other instruction, this instruction improperly limited the jury to the fact of overheating. While it is true the first additional count of the declaration, as well as the second, charges that the defendant permitted the boar to become overheated, the first additional count also in effect charges that by the negligence of the defendant it so treated the hog in its transportation that it died, which in legal effect is a charge of negligence generally. The appellee having the exclusive charge and custody of the property when the loss occurred, it was for it to show what care it took of the animal, and after such proof it remained for the jury to say whether the overheating was caused by the want of such care as the nature of the property required. The court also instructed the jury at request of appellee, that if they believed from the evidence that the death of the hog was due, in whole or in part, from the manner of its carriage, yet unless the defendant was bound in the exercise of ordinary care to anticipate or foresee from such manner some serious injury to the hog from the cause or causes complained of in the declaration, it is not liable. This instruction, like those last mentioned, limited the jury to the specific causes specified in the first and second additional

counts of the declaration—overheating—when as before stated, if under the general charge of negligence in the first additional count, it did not appear the appellee used such care as the nature of the property required, and it was lost, such loss would be attributed to such want and care, and it would not be necessary in such case to show, or for the appellee to have anticipated, the precise cause that occasioned death to the hog. Besides, this instruction, because of its inapt expression, is subject to the further vice of submitting to the jury a question of law, in that it says to the jury:

“Unless the defendant was bound in the exercise of ordinary care to anticipate or foresee from such manner some serious injury to the hog from the cause or causes complained of in the declaration, the defendant is not liable.”

It was doubtless intended by the instruction to tell the jury that if the defendant used ordinary care, and could not thereby anticipate the injury, it was not liable, and in this sense the instruction to that extent would be accurate; however, the instruction does not read so, and can not, we think, be so construed; but the court does tell the jury that unless the defendant was bound in the exercise of ordinary care to anticipate injury, it was not liable. Such instruction, where there is a close contest as to what the evidence proves, as in this case, is misleading.

One of the points made by counsel for appellee in support of the verdict and judgment is:

“Where two persons each own an undivided half interest in a chattel, they can not join in the same suit as co-plaintiffs, and if they do, they can not recover, and the defendant can raise this objection at any point in the proceeding, or on error, and under the plea to the general issue.”

And we are cited to numerous authorities in support of this position. We have examined the authorities cited, and are of the opinion they did not sustain the point. So far as we can see, each of the authorities are in cases *ex contractu*, where the question arose as to the joint rights or liabilities of the parties under contracts, and the correctness of the position in such cases is familiar law; but we can see

no ground for its application in an action *ex delicto*, like the case presented, where appellants are joint owners of the property alleged to have been lost. They might of course, we think, bring separate actions, but if they agree, as it must be supposed they did, to bring a joint action in favor of all, it is not in the power of appellee to rightfully object to it.

For the errors in the instructions of the court to the jury, given and refused, the judgment of the Circuit Court will be reversed and the cause remanded for a new trial. Reversed and remanded.

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109	207

### Chicago & Alton R. R. Co. v. Joshua H. Williams.

1. CONTRIBUTORY NEGLIGENCE—*A Bar to a Recovery for Personal Injuries*.—For the plaintiff to recover for personal injuries in a railroad accident it must appear that he was in the exercise of ordinary care at the time of the accident. Although the evidence may show that the defendant was guilty of negligence, if it appears that the plaintiff's negligence concurred in producing the injury, there can be no recovery.

**Action in Case**, for personal injuries. Appeal from the Circuit Court of Logan County; the Hon. JOHN H. MOFFETT, Judge, presiding. Heard in this court at the November term, 1899. Reversed. Opinion filed February 27, 1900.

BLINN & HARRIS, attorneys for appellant.

BEACH & HODNETT, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$5,000, which appellee recovered against appellant in a suit for injuries caused by a train colliding with a wagon in which appellee was attempting to cross appellant's railroad track at a street crossing in Lincoln, Illinois.

The circumstances under which appellee received his injuries, as disclosed by the evidence, are as follows: Pulaski

street, in the city of Lincoln, runs east and west and intersects appellant's right of way at right angles. At that point appellant had three tracks: the main track in the center, and one side track on each side of the main track. The crossing is a prominent one, and at it appellant keeps a flagman. Sangamon street runs parallel with the railroad tracks, north and south, on the west side of the right of way, and intersects Pulaski street at right angles.

On the day of the accident, about three o'clock in the afternoon, appellee, driving north in a one-horse wagon, on Sangamon street, turned east on Pulaski street, where there was an engine, with three box cars attached, standing on the west side track south of and close to Pulaski street. At the same time there was coming from the south on the main track, a passenger train. The flagman, seeing the train, and that appellee was driving toward the track, unfurled a red flag, and, rushing out into the middle of Pulaski street by the east side track, waved it vigorously back and forth across his body at first, and then up and down. Appellee was at that time about thirty feet west of the west side track. He at first checked his horse and then struck him, starting him in a trot. A teamster, a few feet behind, called out to appellee not to cross. The flagman continued waving the flag and calling out to him to keep back. At the same time another man, who was standing close to the flagman, motioned with both hands to appellee not to cross, and called out several times for him to stay back. The engine on the west side track was making considerable noise, and appellant testified that he did not hear the call to keep back, nor the warning of the teamster behind him. He continued urging his horse over the crossing in the face of the signals of the flagman. After the horse had cleared the main track, the engine of the passenger train caught the wagon, appellee was thrown out, and sustained thereby serious and permanent injuries.

The seemingly reckless conduct of appellee can be accounted for only upon one or the other of the following theories: that he thought he could clear the crossing before the



passenger train reached there, or that he understood the flagman's signal as being a warning against the freight engine standing on the west side track, or that he understood the signals of the flagman to be for him to come on instead of to keep back.

If he knew the passenger train was coming and undertook to cross over the tracks under the belief that he could do so before the train reached that point, his injuries are attributable to his own recklessness, and for them there is no right of recovery, of course.

If he knew nothing of the coming of the passenger train and mistook the signals of the flagman for signals to keep him back from the freight engine, the unfortunate consequences of his mistake should be borne by him and not by appellant. It was his duty to heed the signals and obey them, no matter how needless he may have regarded them. It is in evidence that upon a former trial of the case appellee testified that he understood the flagman's signals to be on account of the freight engine.

In his testimony upon the trial that we are now reviewing, he stated that he understood the signals of the flagman as signals for him to come on. If they were not, but, upon the contrary, were signals to keep back, appellant should not be held liable for the consequences of his misunderstanding them. There is no dispute about the signals that were given. They were given by an unfurled red flag in the hands of the flagman, at first by a horizontal motion and then vigorously by a perpendicular motion. The flagman testified that they were the signals used to warn people approaching a crossing to keep back. He further testified that the signal to parties to pass over a crossing is made with the flag staff and the flag rolled up and over it.

It is a matter of common knowledge in the railroad business that the display of a red flag is a signal of danger, and when made by a flagman, waving it unfurled at a street crossing, that moving cars are approaching. When appellee saw the flagman waving a red flag as vigorously as the evidence shows was done in this case, common prudence

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would seem to dictate that he remain in a place of safety until he should understand what it all meant.

There is a conflict in the testimony as to the speed of the train and as to whether the bell was rung or the whistle sounded as required by the statute. In the view which we take of the case, it is not necessary to discuss that conflict. It is a firmly established doctrine that for the plaintiff to recover in this kind of a case, it must appear that he was in the exercise of ordinary care at the time of the injury. Although the evidence may show that the defendant was guilty of negligence, if it appear that the plaintiff's negligence concurred in producing the injury, there can be no recovery. *The Calumet Iron and Steel Company v. Martin*, 115 Ill. 358; *L. S. & M. Ry. Co. v. Hessions*, 150 Ill. 546; *N. C. S. R. R. Co. v. Eldridge*, 151 Ill. 542; *Chicago City Ry. Co. v. Dinsmore*, 162 Ill. 658.

We feel that appellee was not in the exercise of that care which the law imposes, and that the judgment should be reversed but the cause not remanded. Judgment reversed.

**Finding of Facts to be incorporated in the judgment:**

We find that at the time the plaintiff below received the injuries complained of, he was not in the exercise of ordinary care for his own safety, that his own negligence materially concurred in causing his injuries, and that he has no cause of action against the defendant below.

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**Pulaski Mutual Fire Ins. Co. v. Dawson & Boatman.**

1. *INSURANCE—Payment of Premium to Agents.*—A payment of a premium to an agent is a sufficient payment to the company, under a policy providing that if the payment is not made into the home office within thirty days after the date of the policy it shall be void and of no effect.

Appeal from the Circuit Court of Edgar County: the Hon. HENRY VAN SELLAR, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

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Pulaski Mutual Fire Ins. Co. v. Dawson & Boatman.

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DAVID, SMULSKI & MCGAFFEY, attorneys for appellant.

VAN SELLAR & SHEPHERD, attorneys for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit by appellees against appellant upon a policy of insurance. The case was tried in the Circuit Court of Edgar County by the court, the parties having waived a jury. The court found for appellees and gave judgment in their favor for \$500, to reverse which this appeal is prosecuted.

By the terms of the policy sued upon, appellant, in consideration of the stipulations therein contained, and of \$12.50 premium, insured the appellees from June 30, 1898, to June 30, 1899, against all loss or damages by fire to an amount not to exceed \$500, to their certain barn and the contents thereof, situated in Paris, Illinois.

The policy, among other things, provided that the premium must be paid when the policy is delivered, and if not paid then, nor into the home office within thirty days after the date thereof, it should be void and of no effect. The policy was procured by appellees from one Shepherd, who lived at Paris, Illinois, and represented five insurance companies (appellant not being one of them) as their regular agent at that place. Appellees also lived at Paris, and were in the habit of procuring insurance on their property there from Shepherd. In the latter part of June, 1898, appellees applied to Shepherd to insure their barn and contents for \$500 for one year, and in pursuance of that request he procured the policy in question, delivering same to them in the fore part of July, 1898. On July 30, 1898, appellees paid Shepherd the premium called for by the policy, and supposed the policy insured their property for the time specified therein.

On November 19, 1898, the barn and contents were destroyed by fire. At no time before the property was burned, did appellant inform appellees that the premium had not been received at the home office, or that the policy had been canceled for any cause.

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The evidence shows that Shepherd, soon after he received the premium, sent it, less his commission, to a firm of insurance agents in Chicago, from whom he received the policy. Those agents procured this policy from one Brown, who was the general agent of appellant. The insurance agents in Chicago had a running account with Brown, and it is not clear from the evidence whether Brown in fact accounted with appellant for the premium on the policy in question or not. Appellant, knowing this fact, failed to offer any evidence whatsoever, but submitted the case on appellees' evidence and a stipulation that in case the appellant is liable to appellees upon the policy, then the amount of the recovery thereon shall be for \$500.

Appellant's principal contention in this court is that there is not sufficient evidence in this record to warrant the finding made by the Circuit Court in favor of appellees; and for that reason the judgment of the Circuit Court ought to be reversed.

We think the evidence shows that Shepherd was the agent of appellant and not of appellees, and that when appellant suffered its policy to be sent to Shepherd, a regular insurance agent, to be delivered to appellees, it thereby authorized him to receive the premium therefor, and is bound by the payment thereof to him. Shepherd was not an insurance broker, but a regular insurance agent; hence the authorities cited by counsel for appellant, which hold that an insurance broker, when he procures insurance, is the agent of the insured, do not apply to the facts in this case. Had appellant desired to hold appellees to the strict terms of the policy in requiring the premiums to be actually received at its home office, in order to make the policy effective, then common justice and fairness requires it to notify appellees at the expiration of thirty days after the date of the policy, that such premium had not been so received, and the policy had been canceled on that account; and not having done so, appellant thereby waived it. Finding no reversible error in this record, we affirm the judgment appealed from in this case. Judgment affirmed.

Tipton v. Schuler.

**Margaret F. Tipton v. Henry Schuler and Amos Rutledge.**

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1. **DRAM-SHOP ACT—Evidence in Actions Under.**—To entitle a wife as plaintiff to recover under the dram-shop act, it is not necessary that the proofs show that the intoxication of her husband at the time of receiving the injury was such that his judgment, memory and reasoning were so impaired that he did not know the natural and reasonable consequences of his own acts.

2. **SAME—Degree of Intoxication Necessary.**—The degree of intoxication necessary for a recovery under the dram-shop act is essentially a question of fact; and an instruction which attempts to settle the state of intoxication necessary in order to fix the liability of the defendant is clearly foreign to the province of the judge presiding, and reversible error.

3. **APPELLATE COURT PRACTICE—Review of Instructions.**—Where the sole question for review relates to the instructions, it is necessary for the bill of exceptions to recite only that the evidence tended to prove the issues and was conflicting. The presumption can not be indulged that a judgment is right notwithstanding an erroneous instruction.

**Action in Case,** under the dram-shop act. Error to the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

J. E. POLLOCK and MAYNE POLLOCK, attorneys for plaintiff in error.

OWEN & OWEN and WELTY & STERLING, attorneys for defendants in error.

MR. JUSTICE HARKER delivered the opinion of the court.

Plaintiff in error brought suit under the dram-shop act against Henry Schuler, a saloon keeper, and Amos Rutledge, the owner of the building in which the saloon was kept, to recover for injuries to her means of support occasioned by the selling to her husband of liquor, whereby he became intoxicated and sat down upon the railroad track of the C., C., C. & St. L. R. R. Co., where he was injured by being struck by a passing train. There was a trial by jury resulting in a finding and judgment in favor of the defendants.

The only ground upon which a reversal is asked, is the error of the court in giving to the jury the following instruction :

1. "The court instructs the jury that it is not every degree of intoxication in a case of this kind that entitles the plaintiff to recover, but the intoxication must be to such an extent that her husband was so under the influence of intoxicating liquor that his judgment, memory and reasoning was impaired to such an extent that he did not know the natural and reasonable consequences of his own act, and the jury must believe from the evidence that the injury was the result of the intoxication before they can find a verdict for the plaintiff."

This instruction is clearly bad. To entitle the plaintiff to recover, it was not necessary that the proof show that the intoxication of her husband at the time of receiving the injury was such that his judgment, memory and reasoning was so impaired that he did not know the natural and reasonable consequences of his own acts. The degree of intoxication necessary for recovery is essentially a question of fact; and an instruction which attempts to settle or comprehend the state of intoxication necessary in order to fix the liability of the defendant is clearly foreign to the province of the judge presiding. It is well known that the effect of alcohol upon the mental and physical energies of a number of persons is not proportionate, but may be widely different. It deadens the judgment, memory and reasoning of some whose powers of locomotion are apparently unimpaired, while it inspires the mental faculties of others, yet leaves them helpless physically. In either case, or any case, the degree or nature of intoxication is immaterial if it is clear that the intoxication directly caused the injury complained of. In the case under review, the plaintiff's husband may have been in possession of judgment, memory and reasoning, cognizant of the consequences of his acts, knowing the danger of placing himself upon the track, and yet have been in that state of drunken recklessness or benumbed physical condition as to allow an impulse to place himself upon the track to overcome his natural prudence. This is very similar to some cases of freezing to death where the

person may well know that his only hope of safety lies in steadily walking, and that to sit or lie down means certain death, and still be so under the influence of the cold that he prefers death to the effort of moving on. In *Smith v. The People*, 141 Ill. 452, the Supreme Court says:

“But even if there was intoxication in part or partial intoxication, yet if such intoxication was sufficient to have caused the death of the deceased we are unable to see why the case is not within the purview of the statute.”

The bill of exceptions does not recite any of the evidence heard upon the trial, but merely states that the plaintiff gave in evidence, upon her behalf, testimony that tended to prove the issues in her favor, and that defendants gave in evidence, on their behalf, testimony that tended to prove the issues in their behalf; that is, that the evidence in the case was conflicting. It is insisted it was the duty of the plaintiff in error to bring in the record of all evidence heard, so as to enable the court to determine whether the instruction complained of worked substantial harm to her. The answer to that contention is furnished by our Supreme Court in the following cases: *Nason v. Letz*, 73 Ill. 371; *Schmidt v. C. & N. W. R. R. Co. et al.*, 83 Ill. 405; *I. C. R. R. Co. v. O'Keefe*, 154 Ill. 508.

The rule announced in those cases is that where the sole question for review relates to the instructions, it is only necessary for the bill of exceptions to recite that the evidence tended to prove the issues and was conflicting. The presumption can not be indulged that a judgment is right notwithstanding an erroneous instruction. The presumption is rather that the erroneous instruction has worked harm to the unsuccessful party. If, as a matter of fact, the erroneous instruction complained of was not harmful by reason of matters appearing in proof, the appellee or the defendant in error should have insisted upon the bill of exceptions reciting the evidence before it was signed.

For the error of the court in giving to the jury the instruction quoted, the judgment will be reversed and cause remanded.

**Village of Dalton City v. J. N. Loving.**

1. **PRACTICE—Abatement—Local Actions.**—Section 2 of the practice act, providing that it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides, or may be found, except in local actions, confers a privilege upon the party sued, which he will be presumed to have waived unless he insists upon it by notice or plea in abatement.

2. **VERDICTS—Conclusive upon Questions of Fact.**—Where the evidence is conflicting upon the issues of fact, the Appellate Court will accept the verdict of the jury, with the approval of the trial judge who heard and saw the witnesses, as decisive of these questions.

**Action in Case.**—Overflow of land by water. Appeal from the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

HARBAUGH & WHITAKER, attorneys for appellant.

E. J. MILLER, attorney for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee brought this suit against appellant before a justice of the peace, claiming damages to his house and premises in consequence of the backing of water thereon, caused, as he alleges, by the negligent construction by appellant of a grade along the public highway adjacent to the premises. The case was appealed by appellant here to the Circuit Court, where a trial by jury resulted in a verdict and judgment against appellant for \$25, to reverse which it prosecutes this further appeal.

The highway or street upon which the grade alleged to have caused the damages to appellee was constructed, lies between the counties of Macon and Moultrie, the center thereof being the county line. The village of Dalton City lies east of the county line, wholly in Moultrie county, and the premises of appellant lie west of the county line, wholly in Macon county.



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Village of Dalton City v. Loving.

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It is first insisted as a ground for reversing the judgment of the trial court, that the action is local and therefore could not be maintained in Moultrie county. Section 2 of the practice act provides that it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides, or may be found. Except in local actions, and except in every species of personal actions in law, where there is more than one defendant, the plaintiff, commencing his action where either of them resides, may have his writ or writs issued directed to any county or counties where the other defendants or either of them may be found. The earlier decisions of the Supreme Court by which the provisions of this statute were construed to be jurisdictional, affecting the authority of the court in respect to the county in which a defendant might be sued, have been for a long time modified, and since that time it has been uniformly held that the statute confers a privilege upon the party sued, which he will be presumed to have waived unless he insists upon it by notice or plea in abatement; and the authorities are so numerous and familiar upon this point as to supersede the necessity of citing them. Conceding, then, for the purposes of this point that the present is a local action, we can perceive no reason why it should not be controlled by the principle of the decisions to which we have alluded, and being so controlled, we think appellant waived the question of the cause being a local action, by failing, as it did, to raise the question in the justice and the trial courts by an appropriate motion. Had it sought advantage in this manner and the ruling of the trial court had been adverse to it, such question might then have properly arisen in this court for decision. In the condition we find the record we decline to further consider this point.

It is next insisted the verdict is not supported by the evidence, and that the damage to appellee's premises was caused by his own wrongful act, whereby he caused the water to flow out of its natural course, and so it backed upon his premises and into the basement of the house. It was contended on the trial that appellant erected a grade

along the public highway and failed to construct through it a sufficient passage for the water to flow, and thereby water was backed upon the premises, and this, with the contention that appellee had also contributed to his own injury, formed the leading issues of fact submitted to the jury. The evidence was conflicting upon these issues and we feel compelled to accept the verdict of the jury, with the approval of the trial judge who heard and saw the witnesses, as decisive of these questions. Complaint is made of instructions given and refused, but upon examination we find the action of the court in this respect to be in harmony with our own views.

Finding no error in the record and proceedings of the Circuit Court, its judgment will be affirmed.

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### A. R. Shue and A. D. Webb v. Lina Ingle.

1. *REPLEVIN—Burden of Proof.*—The burden of proof is upon the defendant in replevin, who pleads that he took the property as an officer under an execution, to support the execution by proof of a valid judgment existing at the time the execution issued.

2. *LIENS—Of Stable-keeper—What is Not a Waiver.*—The keeper of a stable left her son in charge, when an officer came with an execution to levy upon some property which had been left at the stable for feeding and care. The son, who was attending to the business of the stable, informed the officer that he had a better claim upon the property, and declined to surrender it. The officer returned to the stable later, and in the absence of the keeper or her son, and without their knowledge or consent, seized and took away the property (a horse, buggy and harness). *Held*, that the keeper of the stable had not waived her lien upon the property.

*Replevin.*—Error to the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

GEORGE K. INGHAM, attorney for plaintiffs in error.

HERRICK & HERRICK, attorneys for defendant in error.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was an action of replevin against appellants for horse, buggy and harness. A jury was waived, and the trial resulted in a finding and judgment for the defendant in error, to reverse which this writ of error is prosecuted.

Defendant in error was the keeper of a livery and feed stable at Farmer City, and had the possession of the property for feeding and care as the property of H. C. Littlejohn. Plaintiffs in error, sheriff and deputy, had execution in favor of Arbogust against Littlejohn, and sought to levy the same upon the property, when the son of the defendant in error, who was attending to the business of the stable, informed the sheriff that he had a better claim upon the property, and declined to surrender it, although there is controversy as to what he did say or the nature of the claim asserted, it being contended by plaintiffs in error that he asserted ownership and thereby waived the right of defendant in error to a lien as stable keeper. Plaintiff in error later returned to the stable and in the absence of defendant in error, and of her son, and without their knowledge or consent, seized and took the property away. Soon after ~~this~~ defendant in error, in writing, demanded the return of the property to her, stating the nature and amount of her claim and lien, which is not disputed, and on refusal to surrender, she paid Rittenhouse, the care taker of the sheriff, \$3.50, that being his charges, and then caused the same to be seized upon the writ of replevin issued herein. On the trial it appeared no judgment had been entered in the case of Arbogust v. Littlejohn, in which the execution had been issued, although during a trial a judgment was ordered *nunc pro tunc* as of the previous term.

We do not think from aught that appears in evidence, that the defendant in error waived her claim and lien against the property. It will not be presumed in the absence of proof, the son, who was in charge of the stable, possessed special authority to waive the rights of the principal. The evidence proves no more than that he was attending to the

ordinary duties appertaining to the business, and it is unreasonable to infer that he was authorized to give away the property or to surrender valuable rights without consideration. Besides, the most that can be justly concluded from the evidence is that the son was insisting upon a claim or right to the property, and while the specific nature of the claim was not then disclosed, it was later done by the principal herself. Moreover, the nature of the business in which defendant was engaged, which was open to observation, and the possession by her of the property, was sufficient notice to put plaintiffs in error upon inquiry of the defendant herself, whose rights were to be affected by the levy of the execution before they deprived her of its possession, and not having afforded her such opportunity to make the nature and amount of her lien known to them before they seized and carried the property away, they are in no position to insist, as they now do, that such lien was waived.

The claim to the property being by a person not a party to the suit in which the execution issued, it was for plaintiffs in error to support the execution by proof of a valid judgment existing at the time the execution issued. *Johnson v. Holloway*, 82 Ill. 334. The evidence shows there was no judgment at that time, therefore the execution conferred no authority upon plaintiffs in error to deprive defendant in error of the possession of the property. *Knights v. Martin*, 155 Ill. 486, and cases cited.

Finding no error in the record and proceedings of the Circuit Court, its judgment will be affirmed.

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### St. Louis, P. & N. R. Co. v. Daniel J. Cronin.

1. *ORDINARY CARE—Railroads in Course of Construction.*—In an action for personal injuries received by a switchman while in the employ of a railroad in the course of construction, an instruction that if the road at the point where the injury occurred, was, at such time, at that period of construction usual and customary in roads under good management, the plaintiff could not recover is proper, and its refusal

St. Louis, P. & N. R. Co. v. Cronin.

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where the point is not sufficiently covered by other instructions is reversible error.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

CONKLING & GROUT, attorneys for appellant.

PATTON, HAMILTON & PATTON, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee sued appellant in an action on the case for negligence in failing to keep its switch track filled between the ties, whereby appellee, in the ordinary discharge of the duties of his employment as brakeman and switchman, while coupling cars, stepped between the ties, in consequence of which his arm was passed between the dead-woods about the couplings of the cars and was so badly injured that it required amputation and was thereby lost to him. A trial by jury resulted in a verdict and judgment against appellant for \$5,000, to reverse which it appeals, and for error urges that the verdict is against the evidence and that the court refused to properly instruct the jury.

It appears that appellee at the time he received his injury was engaged in the service of appellant as brakeman and switchman upon a freight and construction train between Springfield and Pekin, and north of the latter place as far as the road then extended. The railroad was not at this time in operation except for local freight between the points above mentioned, but was in progress of construction only. The track in the latter part of January had been laid between two and three miles north of Pekin, and at this point an extra or switch track had been laid for the purpose of unloading steel for further track construction beyond, and the use of the cars from Pekin to this switch track was for such purposes. The spaces between the ties upon which the switch track was laid, were not filled or

leveled with the top of the ties, and for such reason, it is alleged, the use of the switch in that condition was dangerous to appellee while engaged in his ordinary duties of coupling cars, and in this respect it is argued appellant was guilty of negligence. Ordinarily, or when a railroad is in operation, it is not contended that a switch track in such condition would not be a fault of the master, but the insistence here is that the road at this point, being merely in an incomplete condition of construction, and such fact being known to appellee, it was one of the usual hazards of his employment; and further, that the track at this point was constructed in the usual and customary manner that tracks are generally constructed, under good management, in the period of construction then reached. These points composed the vital and controlling issues of the case, and required the court, as far as requested, to properly advise the jury in its instructions regarding the same. Appellant asked the court, in effect, to instruct the jury that if the road at the point where the injury occurred, was at such time at that period of construction in the usual and customary condition of roads under good management, the plaintiff could not recover. The appellant was charged with a failure to use ordinary or reasonable care in its construction of a safe track for the use of appellee. What would be ordinary or reasonable care, is, of course, a question of fact, to be determined by all the evidence and the circumstances disclosed. If the track was in the usual and customary condition of similar tracks of roads under good management at that period of construction, then appellant had used ordinary or reasonable care; for that which is usual and customary under good management, is the same as ordinary care, even if not a stronger expression. The instruction given by the court did not sufficiently cover this point, and hence we think the court erred in its refusal to give the instruction asked, and for this the judgment of the Circuit Court will be reversed and the cause remanded.

**Orrin F. Place v. The People ex rel., etc.**

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1. **CORPORATIONS—Can Exercise Corporate Acts Only Within the State.**—The general rule is that corporations can exercise strictly corporate acts only within the State of their creation.

2. **SAME—The President, a Corporate Officer.**—The president of a corporation is a corporate officer by the express provisions of Sec. 6, Chap. 73, p. 995, Starr & Curtis' Ill. Statutes 1896.

3. **SAME—Elections Can Be Held Only Within the State.**—Corporate elections can be held only within the State under whose laws the corporation is organized, unless there is a statute permitting them to be held elsewhere.

4. **SAME—Directors as Agents.**—Directors of corporations organized in this State, as agents of their corporations, may transact business of the nature and purpose for which their corporations were formed, but they are without power or authority to perform strictly corporate acts outside of this State.

5. **MANDAMUS—Acquiescence and Laches, When Not a Bar.**—When an information in the nature of a *quo warranto* requires the relator to show a *de jure* title to an office, an acquiescence of five years on the part of the people does not constitute a bar to the proceeding in mandamus by way of estoppel, or *laches*.

**Mandamus.**—Appeal from the Circuit Court of Christian County; the Hon. WILLIAM M. FARMER, Judge, presiding. Heard in this court at the November term, 1899. Affirmed. Opinion filed February 27, 1900.

J. C. McBRIDE and KRETZINGER, GALLAGHER & ROONEY, attorneys for appellant.

JAMES M. TAYLOR and FRANK P. DRENNAN, attorneys for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

A petition was presented March 7, 1893, to the Circuit Court of Christian County, by Joseph C. Creighton, State's Attorney of that county, for leave to file an information in the nature of a *quo warranto* against Orrin F. Place, in behalf of the People of the State of Illinois, upon the relation of Reuben Wilkinson. The court granted leave, and the information was filed.

The information, among other things, set forth that Orrin F. Place, for three years past and more, in said county of Christian, had unlawfully held and executed, and still does hold and execute, without any warrant or right whatsoever, the office of president of the Crowned King Mining Company, a corporation existing under and by virtue of the laws of the State of Illinois, having its principal office in Edinburg, in said county of Christian and State of Illinois, etc., and prays that Orrin F. Place may be required to show by what warrant he claims to hold and execute the office aforesaid. To this information Orrin F. Place interposed three pleas, to which the court sustained a general demurrer, and Orrin F. Place abiding by his pleas, judgment of ouster was entered against him.

Orrin F. Place brings the case to this court and urges us to reverse that judgment on the grounds that the pleas set up a good defense to the information and the court erred in sustaining a demurrer to them.

The pleas each averred that appellant claimed title to the office in question by virtue of his having been elected thereto more than five years before the information was filed, at a meeting of the directors of said company, held in Arizona, outside of this State; that appellant had acted as such officer since his said election, with the full knowledge and consent of all the stockholders and officers of the company, and with the full acquiescence of the relator and the People of the State of Illinois, which facts were, by the pleas, relied upon as a bar to the proceeding.

In the state of the case as disclosed by the record, appellee was properly calling upon appellant to show a *de jure* title to the office of president of the Crowned King Mining Company, a corporation organized under the laws of this State, with its principal office at Edinburg, Christian County, Illinois; and appellant undertook by his pleas to show such title or facts as would bar the proceeding. The only title set up by the pleas was that he was elected such president at a meeting of the directors of that company, held outside the State of Illinois.



The general rule is that corporations can only exercise strictly corporate acts within the State of its creation. Reichwald et al. v. Commercial Hotel Co., 106 Ill. 439, and Bastiam et al. v. Modern Woodmen, 166 Ill. 595.

The president of the corporation is a corporate officer by the express provision of Sec. 6, Chap. 73, p. 995, Starr & Curtis' Ill. Statutes (1896). Thompson in his Commentaries on the Law of Corporations, Sec. 703, in Vol. 1, p. 544, Ed. 1895, states the general rule to be that "corporate elections can only be held within the State under whose laws the corporation is organized, unless there be a statute of the State permitting it to be held elsewhere." Directors of corporations organized in this State, as agents of their corporations, may transact business of the nature and purpose for which their corporations were formed, but they are without power or authority to perform strictly corporate acts outside of this State, and the attempt on the part of the directors of said company to elect appellant president thereof at a meeting held in Arizona, as stated in the pleas, did not constitute him the *de jure* president thereof.

As to appellant's claim that the acquiescence of the relator and the people in his acting as president of that company after his said election until this information was filed, constituted a bar to this proceeding by way of estoppel, and *laches*, we will say that the information required him to show a *de jure* title to the office; and such acquiescence or delay does not give him *de jure* title thereto, nor does such acquiescence or delay tend in any manner to work any unreasonable prejudice to appellant, or to the stockholders of the Crown King Mining Company, if he is forced to quit acting as the *de facto* president thereof, and should not bar the proceeding for that reason.

Inasmuch as the pleas did not set up a *de jure* title in appellant to the office in question, or otherwise show a valid defense to the proceeding, the court properly sustained a demurrer thereto, and as appellant stood by his pleas, the judgment of ouster properly followed, which we must affirm. Judgment affirmed.

CASES  
IN THE  
APPELLATE COURTS OF ILLINOIS.

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FIRST DISTRICT—MARCH TERM, 1899.

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**D. J. Downey v. E. J. Abel.**

1. INSTRUCTIONS—*Oral, by Agreement.*—Upon the trial of a cause by jury, the presiding judge said in the presence of the parties that "if agreeable, he would instruct the jury orally;" there was no objection, and he did so. As there was no reversible error in the instruction given, *it was held* proper.

**Forcible Detainer.**—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 13, 1900.

D. J. DOWNEY, appellant *in personam*.

SAMUEL M. BOOTH, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is a suit in forcible detainer commenced by appellee before a justice of the peace in July, 1898, to recover from appellant possession of rooms in the Abel office building in this city. Judgment was rendered against appellant by the justice of the peace, and an appeal from such judgment was taken to the Circuit Court. A trial was there had before a jury, and a verdict returned against appellant.

Upon such verdict a judgment was entered in the Circuit Court, to reverse which this appeal is taken.

Twenty-six alleged errors are assigned, covering between five and six typewritten pages. We shall not attempt to consider them *seriatim*.

The case was upon the short cause calendar of the Circuit Court. When called for trial October 3, 1898, appellant moved the court to continue said cause for the reason that the attorney for appellant was engaged before another judge of said court in a designated case. Thereupon, as appears in the bill of exceptions (although no order in that regard was entered of record), the motion was "granted by the court and the case passed until" the attorney was released from the other court. Afterward, and the same day, but how long after does not appear, the case was again called for trial, and appellant again moved the court to continue for the same reason as before. Upon further inquiry it was shown to the court that the attorney had not been and was not engaged in the trial of the case designated; that said case was not being tried in the other court, and had not been called for trial. Thereupon, the motion to further continue the case was denied. That is here assigned and urged as error. There was no error in refusing such motion. If the court could have entered judgment, because of the imposition thus practiced upon it, and had it done so, it could not be properly claimed that the court had not done what was just right.

It does not appear that the lease of the premises in question was in writing. There was, therefore, no error in allowing witness to state the rate of rent per month.

Permitting testimony to be offered that certain things were stated at the trial before the justice of the peace which are not mentioned or referred to in the transcript of the justice, is not impeaching such transcript.

Appellee, when on the witness stand, was asked by his attorney to state what became of the so-called five days' notice and to state what it contained. Appellant's objection to that question was overruled. In his answer, appellee

stated that such notice was filed in the justice's court the day of the trial—that the justice accepted it as sufficient—that he (the witness) had made diligent search for it, and could not find it—that the justice said it was lost the day of the trial—and also stated contents of such notice. Appellant moved to strike out the entire answer. That motion was properly denied, for the reason that a part of the answer was competent testimony. A part of the answer was not competent, and had appellant moved to strike out that part, his motion should, and probably would, have been sustained. The trial court did not err in denying the motion as made.

There was no error in refusing the motion of appellant to instruct the jury to find the appellant not guilty.

The trial court said, that if agreeable to the parties, he would instruct the jury orally. It does not appear that there was any objection, and he did so instruct. It is now too late to urge that as being an error. And we see no reversible error in the instruction given by the court.

One of the grounds stated by appellant in his motion for a new trial, is that of newly discovered evidence. Four affidavits are filed with said motion for a new trial, as to what may be proved by certain witnesses. But there is no statement in the affidavits of appellant, or elsewhere, showing any diligence on the part of appellant to obtain the testimony of such witnesses. As to one of them, appellant says that he learned the address after the trial. It does not appear that he ever tried to find such address before the trial, or that there are not other witnesses by whom he could prove the same as by that witness. That is not sufficient. No diligence is shown.

There is no error apparent to us in any of the other points presented by appellant, which would justify a reversal of this case. Substantial justice has been done.

The judgment of the Circuit Court is affirmed.

**J. Russell Jones and Elizabeth Jones v. The Carey-Lombard Lumber Co.**

1. **MECHANIC'S LIENS—Who are Entitled.**—A person who by contract with one whom the owner of premises has authorized or knowingly permitted to improve the same, furnishes material, etc., is entitled to a lien.

2. **SAME—Agreements Between Landlords and Tenants for Improvements.**—If an agreement between a landlord and his tenant for the erection of improvements upon the premises demised to be used by the tenant in his business, is a building contract within the terms and meaning of the mechanic's lien statute, the tenants are sub-contractors, and if it is not a building contract, it is a contract with the tenant as principal for improving his estate as tenant; in which case a person furnishing material is entitled to a lien upon the estate of the tenants.

3. **SUB-CONTRACTOR—Notice Required.**—A sub-contractor is not entitled to a lien under the mechanic's lien law unless he serves a notice upon the owner as required by statute.

**Mechanic's Lien.**—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded with directions. Opinion filed February 13, 1900.

**Statement.**—By a certain indenture of lease and contract, dated February 5, 1896, appellant, J. Russell Jones, party of the first part thereto, leased to Thomas C. Kane and David Meyer, party of the second part thereto, certain lots of land in the city of Chicago for the term of five years, from May 1, 1896, at a rental of \$1,500 per annum. Said lease contained provisions relating to a building to be erected on said lots, which, so far as they are important in considering this case, or are urged by counsel to be so, are as follows, viz. :

“It is further expressly understood and agreed that the said party of the second part shall, within four months from the date hereof, erect upon said premises buildings and other permanent improvements to cost not less than the sum of six thousand dollars (\$6,000), the plans and specifications for which said improvements are to be submitted to said party of the first part for his approval before

the work thereon shall begin; and no buildings or other improvements of any kind shall be placed on said premises without first obtaining in writing such approval of the plans thereof by said party of the first part.

"It is further understood and agreed that all buildings, fences, walks and improvements of every kind and nature whatsoever so erected or placed on said premises by said party of the second part shall, when placed thereon, become immediately a part of the realty and the property of the said party of the first part, and that upon the termination of this lease, either by limitation or otherwise, such buildings and improvements of every kind which shall have been placed upon said premises by said parties of the second part, are to be at once delivered into the possession of said party of the first part, together with the ground herein demised.

"It is further understood and agreed that should said party of the first part desire to use the premises herein demised at any time after the expiration of the first year of the term hereof for the purpose of erecting buildings thereon, or any other purpose, he shall have the right to terminate the said term upon first giving ninety days' written notice unto said parties of the second part of his intention so to do, and upon the payment to said parties of the second part, should such termination occur, pursuant to the right in this clause given, at any time during the second year of the term hereof, the sum of \$4,800; or should such termination occur at any time during the third year of the term hereof, the sum of \$3,600; or if at any time during the fourth year of the term hereof, the sum of \$2,400; or if at any time during the fifth year of the term hereof, the sum of \$1,200.

"It is further understood and agreed that for the cost of any of the buildings or improvements which may be made by the parties of the second part, during the term of this lease, they shall permit no mechanic's lien to attach to said premises, and that should said parties of the second part fail to keep this agreement, and the said party of the first part be obliged, in order to protect said premises, to pay off and discharge any such mechanic's liens, he shall have the right forthwith, to terminate the term hereof, upon thirty days' notice of said parties of the second party in writing of his intention so to do. \* \* \*

"It is further understood and agreed that said parties of the second part shall, at all times, during the continuance

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Jones v. Carey-Lombard Lumber Co.

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of this lease, keep all buildings and improvements erected or placed upon the premises herein demised insured in the name of the said party of the first part for their full insurable value.

“The said party of the second part further agrees not to remove any buildings or other improvements from said premises without the written consent of said party of the first part.”

Besides the above, said indenture contains the usual long and detailed provisions in a Chicago lease. Said Kane and Meyer caused to be erected upon said premises a building as contemplated, under the provisions of said lease contract. They entered into a written contract with appellee which recites that they, said Kane and Meyer, “are about to erect certain buildings and improvements” upon the said premises for the purpose of operating a pavilion and summer garden, and are desirous of purchasing the lumber and some other building material for said improvements” from appellee. Said agreement then provides for the purchase and sale of such lumber and building material, which was afterward delivered by appellee under said contract.

GREEN, HONORÉ & PETERS, attorneys for appellants.

JAMES H. HOOPER, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

The bill of complaint was filed in this case by appellee to enforce a mechanic's lien against the lots of land described in said lease contract and the improvements thereon. Said Kane and Meyer have no title to or interest in said land other than that acquired under said lease. By the decree entered in said cause, it is provided that appellee is entitled to a lien upon the title and interest of appellants in said land.

It is contended by counsel for appellants that the claim of appellee, if any it has, is that of a sub-contractor; that no

notice was served as required by statute and that therefore appellee is not entitled to enforce a mechanic's lien against the land of appellants.

In reply, counsel for appellee say in their printed argument:

"We do not claim to have served any sub-contractor's notice upon the owner. We stand or fall upon our having completely complied with the lien statute in regard to original contractors."

It seems to be the position of counsel for appellee that under the provision of Sec. 15, Ch. 82, Hurd's Stat. of 1899 (being Sec. 1 of Mechanic's Lien Law of 1895), appellee is entitled to a mechanic's lien as an original contractor. Said section provides:

"Any person who shall by any contract with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to improve the same, furnish material, etc., shall be entitled to a lien."

That provision does not apply to one who is in fact a sub-contractor. To hold otherwise would in effect be a judicial repeal of all the numerous sections in that act relating to sub-contractors. Sec 36 of said Ch. 82, provides:

"Every person who shall in pursuance of the purposes of the original contract, furnish any material \* \* \* shall be known under this act as a sub-contractor."

In every original contract with the owner for the improvement of land, the original contractor is "one whom such owner has authorized and knowingly permitted to improve" such land. But a material man who furnishes material for such improvement under a contract with the original contractor, is not himself an original contractor, but is a sub-contractor. The statute is intended to apply to cases where the "owner has authorized or knowingly permitted" some one to so act as to constitute himself an agent for the owner. It is intended to prevent frauds, not to annul or set aside *bona fide* contracts with owners.

Said Kane and Meyer agreed with appellant, J. Russell Jones, to erect a building and make improvements upon the



land in question such as they desired for their business. The fact that the agreement for the making of such improvements is embodied in the same instrument with, and forms a part of, the lease, does not change its effect or the construction to be given to it.

We do not wish to be understood as holding that said agreement, made as it was between landlord and tenant, as to improvements upon the premises demised to be used by the tenants in their business, constitutes a building contract within the terms and meaning of the mechanic's lien statute. But if it be such a contract, then appellees are subcontractors; and if it be not such a contract, then it is a contract with said Kane and Meyer as principals for the improving of their estate as tenants. In the latter case appellee might be entitled to a lien upon the estate of the tenants. In neither case is the appellee entitled to a lien upon the property of appellants.

The decree of the Circuit Court is reversed and the cause remanded with directions to dismiss said petition. Reversed and remanded with directions.

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### C. S. Young v. Wells Glass Co.

1. APPELLATE COURT PRACTICE—*Bill of Exceptions—What it Must Show.*—A bill of exceptions must show that the party either excepted to the finding of the court, or made a motion for a new trial.

2. SAME—*Motion for a New Trial—How Made a Part of the Record.*—The certificate of the clerk does not make the motion for a new trial a part of the record; the law requires the certificate of the judge and not of the clerk, to that fact.

**Assumpsit.**—Common counts. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 13, 1900.

JAMES H. TELLER, attorney for appellant.

HENRY W. WOLSELEY, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

The judgment of the Superior Court in this case must be affirmed. No points in writing specifying the grounds of any motion for a new trial appear in the transcript of record as provided by Sec. 57 of the practice act; neither does it appear in the bill of exceptions that a motion for a new trial, either oral or in writing, was made or filed, and overruled, and exceptions taken.

The bill of exceptions does not mention, and makes no reference to a motion for a new trial; or to points in writing specifying the grounds for any such motion; or to the overruling of such a motion; or to any exceptions relating to the overruling of such a motion.

The clerk of the trial court states in the record that "The defendant, Charles S. Young, submits herein his motion for a new trial in said cause." Also that "This cause coming on to be heard upon the motion of the said defendant, Charles S. Young, heretofore filed herein," the same is overruled. But that does not make it a part of the record.

"The law requires the certificate of the judge and not of the clerk, to that fact." *Boyle v. Livings*, 28 Ill. 316, cited with approval in *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 108; *Gould v. Howe*, 127 Ill. 252.

"It must appear from the bill of exceptions that the defendant either excepted to the finding of the court, or made a motion for a new trial." *Fireman's Ins. Co. v. Peck*, 27 Ill. App. 91, affirmed in 126 Ill. 493.

This point is definitely presented by counsel for appellee in his brief and argument, long since filed in this cause, and counsel for appellant must have been advised of same, but make no reply.

The judgment of the Superior Court is affirmed.

State Bank of Chicago v. Boyesen.

State Bank of Chicago v. A. Boyesen et al.

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98	622

1. GARNISHMENT—*Nature of the Proceeding.*—Garnishment is a proceeding at law in which the garnishor is not entitled to recover unless the judgment debtor could recover a judgment against the garnishee in a suit at law prosecuted by him personally, and in his own right.

2. JURISDICTION—*Of the Appellate Court When a Jury Has Been Waived.*—The Appellate Court has jurisdiction to review a case upon the merits when a jury was waived and the cause submitted to the court below for trial, although no propositions of law were submitted to the trial court for its holdings thereon.

**Garnishment.**—Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Reversed and remanded. Opinion filed January 20, 1900. Rehearing denied. Mr. Justice FREEMAN dissenting.

**Statement.**—Appellant was summoned as garnishee in an attachment proceeding by appellee against one J. G. Thweatt, a resident of Arkansas.

On or about the 14th or 15th of July, 1896, appellant received the following letter:

“DEVALLS BLUFF, Prairie County, Arkansas.  
July 11, 1896.”

“STATE BANK OF CHICAGO, Chicago, Ill.

“GENTS: Enclosed find two notes signed by myself and mortgage executed by myself & wf. to W. B. Williams, trustee, Anna A. Jones, beneficiary, conveying lot of lands in Lee Co., this State. Let Mr. Williams inspect the notes and mortgage. Mr. Williams will likely place in your hands for inspection and collection a deed from Anna A. Jones to me to lands embraced in mortgage. When he does, notify at once Mess. Ferguson & Goodnow, 84 La-Salle St., and let them inspect it. If O. K. I will wire you where to present the deed for payment of purchase money, to be paid cash. This and the notes and mortgage you will turn over to Mr. Williams or party presenting deed. Messrs. F. & G. will wire me if deed is O. K. Acknowledge receipt, please.

Yours,  
J. G. THWEATT.”

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This letter contained inclosures as follows :

Two notes, both bearing date July 6, 1896, signed by J. G. Thweatt, and payable to Anna A. Jones or order, each for \$3,852.20, and due one in twelve and the other in twenty-four months from date thereof, with interest at the rate of seven per cent per annum from date until paid. Also a trust deed signed by said Thweatt and wife, conveying 3,852.21 acres of land in Lee county, Arkansas, to W. B. Williams in trust, to secure the payment of the two above described notes, which said trust deed was acknowledged before a notary public of Prairie county, Arkansas, but not recorded.

A few days thereafter appellant received the following letter :

" JULY 20, 1896.

" CASHIER, STATE BANK OF CHICAGO,

" Chicago, Ill.

" DEAR SIR : I hereby hand you my check for the sum of \$3,582, to be used as a cash payment on 3,581 acres of land in sections 2, 3, 10, 11, 12, 13, 14, 15 and 23, in township number 3 north of range number 1 of the fifth principal meridian, in Lee county, State of Arkansas. This money to be paid to W. B. Williams, of number 7 Board of Trade, Chicago, upon the delivery to you of a good and sufficient warranty deed conveying said lands, executed by Anna A. Jones to J. G. Thweatt, according to the statutes of the State of Arkansas, reserving the right to examine said deed before money is paid to said W. B. Williams, and in case of failure on the part of said Williams to deliver said deed, then the money to be placed to my credit. In this same transaction, I am advised by J. G. Thweatt, of Devall's Bluff, Arkansas, that he has forwarded to your bank mortgages and notes for the balance of the purchase money on said lands.

Yours truly,

L. JOHNSON."

The check inclosed was as follows :

" No. 213.

CHICAGO, July 15, 1896.

" State Bank of Chicago, pay to order of yourselves \$3,582, thirty-five hundred and eighty-two dollars.

L. JOHNSON."

There was money to meet this check to the credit of said

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Johnson in the appellant bank, and upon service of the writ the bank certified the check and filed it away with the garnishment papers relating to this case.

The same day the above letter from Johnson was received the cashier of appellant sent the following letter :

“ CHICAGO, July 20, 1896.

“ W. B. WILLIAMS, Esq.,

Number 7 Board of Trade, Chicago.

“ DEAR SIR: We are in receipt of certain papers from Mr. J. G. Thweatt of Devall's Bluff, Arkansas, consisting of mortgage deed and two notes of \$3,852, together with cash to the amount of \$3,582, all of which we are instructed to deliver to you upon the receipt by us of a good and sufficient warranty deed to the land described in said mortgage. We stand ready to pay the above amount to you or your representative upon the receipt of the above described deed.

“ Please send it to us at your earliest convenience, or advise us when it will be convenient for you to have our messenger call upon you, as we wish this matter settled up as soon as possible.

“Awaiting your early reply, we remain

Yours truly,

JOHN R. LINDGREN,  
Cashier.”

DENEEN & HAMILL and EDWIN WHITE MOORE, attorneys  
for appellant.

DANIEL V. SAMUELS, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

There is no testimony in this case showing when the money standing to the credit of said Johnson in appellant bank was deposited there or from whom or what source it came. Therefore, so far as appears from this record, that money belonged to said Johnson. By his said check he authorized the payment or appropriation of the amount named therein for the purpose and in the manner stated in his letter inclosing said check to appellant. Said Thweatt was not served personally with process in said garnishee

proceeding, neither was his appearance entered in the case. There is no judgment against him *in personam*. It is urged that the declaration does not state a cause of action. The court had jurisdiction and it is therefore not for appellant to question the judgment. Said Johnson is not a party to this proceeding and can not therefore be bound by the judgment. The testimony fails utterly to show his interest, if any, in the lands, the purchase of which, from said Williams, was contemplated. It is just as reasonable to suppose or imagine that said Johnson was jointly interested in such purchase as to suppose or imagine, as it is urged, that the money represented by said check belonged to said Thweatt. We can not rest a decision upon a theory based upon imagination of what is not proven.

That letter states that said money is to be paid to one Williams upon the delivery to appellant of a certain warranty deed. There is no testimony tending to show that such deed was ever delivered to appellant, or that there was ever any offer to deliver the same or any tender thereof.

As we understand this case it is simply this: Mr. Johnson put \$3,582 of his own money into the hands of appellant with direction to appellant to pay the same to Mr. Williams upon the delivery by said Williams to appellant of a certain warranty deed (the right being reserved to examine said deed before the money is paid). We are unable to discover any theory upon which it may be correctly held that such money can be appropriated to pay a debt due from said Thweatt.

Assume it to be true, as contended by appellee, that the letter signed by the cashier of appellant (although written by the collection clerk) stated to Mr. Williams that said money was received from said Thweatt; that does not change the legal rights of the parties to this suit. Mr. Williams is not claiming anything here against appellant. If he had done or suffered anything on account of that letter, appellant might be estopped as against him, from claiming that said money was not in fact received from said Thweatt. But there is no testimony tending to show that

appellee did or suffered anything by reason of said letter. Appellant is not, therefore, estopped by said letter from asserting in this case, and as against appellee, that the statement in said letter that the money came from Thweatt was incorrect.

The letter from Thweatt to appellant states in substance that when the warranty deed therein mentioned is placed in the hands of appellant, notice is to be given to attorneys therein named, who would examine the same, and that if said attorneys wired him (Thweatt) that the "deed is O. K." that he (Thweatt) would wire appellant "where to present the deed for payment of purchase money to be paid in cash." No deed was placed in the hands of appellant as contemplated by said letter. Hence, and of course, no examination of the deed referred to could be made by the attorneys, and said Thweatt never wired appellant where to present said deed for the payment of purchase money. So far as this record shows, there was never any interview between said Thweatt, or any one acting for him, and any one representing appellant, and never any other letter from him received by appellant.

The letter from Thweatt and the one from Johnson both mention the same names as parties to the warranty deed, and it may be assumed that they both refer to the same transaction. But it does not follow that the money in bank to Johnson's credit belonged to Thweatt. Counsel for appellee in their printed argument said that "Johnson was the confidential agent of Thweatt, who sent the money to him (Johnson) for delivery to the bank." Counsel make no reference to any testimony to support this statement, nor have we noticed any such testimony. Neither is there any testimony to warrant the serious imputation contained in said printed argument, when it is there said that "We may surmise that Johnson could not be induced to perjure himself for the benefit of Thweatt or the bank." When there is no reliable testimony upon which to base such an imputation it should not be made.

This is a proceeding at law, and the appellee is not entitled

to recover in this suit unless said Thweatt could maintain a judgment against appellant in a suit at law prosecuted by him personally and in his own right. The testimony in this record would not warrant a recovery by Thweatt against appellant for the money represented by said check drawn by said Johnson. Therefore appellee can not sustain such a recovery. *Webster v. Steele*, 75 Ill. 544.

This court has jurisdiction to review a case upon the merits when a jury was waived and the cause submitted to the court for trial, although no propositions of law were submitted to the court for its holdings thereon. *Flood v. Leonard*, 44 Ill. App. 113; *Armstrong v. Barrett*, 46 Ill. App. 194; *Hollenberg v. Tompkins*, 49 Ill. App. 325.

The judgment of the Circuit Court is reversed and the cause remanded.

MR. JUSTICE FREEMAN dissenting.

I can not concur in the foregoing opinion, nor the conclusion stated, and have concluded to state my reasons.

The principal question is whether the evidence warrants the finding that appellant was indebted to Thweatt, it being contended that the money in controversy was not the property of the attachment debtor. It is also urged that the declaration does not state a cause of action.

The defendant Thweatt did not appear. His default was entered, damages were assessed by a jury and judgment rendered against him in favor of appellee. The evidence upon which such verdict and judgment were based is not preserved by bill of exceptions, and the record is silent except as to the fact.

The declaration contains the common counts together with a special count, which appellant insists shows affirmatively that appellee has no cause of action. It is urged that this special count is not merely a defective statement of a good cause of action, but states no cause of action at all. It states in substance that the defendant Thweatt agreed to purchase for appellee a ranch in Arkansas, which is described, at an agreed price, and that it was agreed Thweatt



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should receive a commission of five per cent on the said purchase price as his compensation; that he did buy the land at the agreed price, but endeavored to obtain from appellee an extra dollar per acre for himself by false representations which were partially successful; that after fraudulently obtaining from appellee five hundred dollars, when his misconduct was discovered he sought to obtain the title himself and endeavored to deprive appellee of the purchase, breaking his agreement, thus compelling appellee to pay nearly four thousand dollars more than he would have paid but for Thweatt's violation of the contract.

While this special count may be justly open to criticism it is not, I think, open to the objection that it does not state facts which sufficiently show appellee to have been damaged by the defendant's alleged violation of the contract. Even if it be conceded that the declaration was defective, it is still a declaration in the case and might have been amended on leave of court, had objection been made to it at the proper time. *Tunnison v. Field*, 21 Ill. 107, (109). The wording of the affidavit upon which the attachment writ was based is said to state a cause of action different in its nature from that set forth in the special count. But this objection need not be considered. It seems to be conceded by appellant's counsel that if the special count states a cause of action, it will support the judgment, and it has been held as to an affidavit of claim that it is a pleading authorized by statute, and amendable like any other statement of plaintiff's case. *Healy v. Charnley et al.*, 79 Ill. 592. Whatever force there may be in the objection, the affidavit complies, in form at least, with the requirement of the statute, and gave the court jurisdiction; and where the court has jurisdiction its errors and irregularities can only be called in question by the defendant, and that, too, in a direct proceeding for the purpose. The garnishee has no cause to complain, for he will be protected in the payment of the judgment. *Dennison v. Taylor*, 142 Ill. 45 (51); *Pomeroy v. Rand*, 157 Ill. 176-184. The question of the sufficiency of the declaration

would only arise upon appeal or writ of error from the judgment itself. *Nat. Ins. Co. v. Chamber of Commerce*, 69 Ill. 22 (27).

The issue raised by the answer of appellant as garnishee was submitted to the court for trial without a jury. The court found that appellant was indebted to Thweatt, and had in its possession subject to garnishment, the sum of thirty-five hundred and eighty-two dollars, and judgment was rendered accordingly. I believe this judgment to be supported by the evidence, and radically disagree in this respect with the preceding opinion. The objection urged is that inasmuch as the money in controversy was paid to the bank by or through one L. Johnson, who stipulated in his letter accompanying the check that in case Williams should fail to deliver the deed in accordance with the directions given, the money should be placed by the bank to his credit, that the bank accepted it on those terms, and was bound to so return it to Johnson. Conceding this to be true as between the bank and Johnson, it proves nothing as to the ownership of the money itself. If it was in fact the money of the defendant in the attachment proceeding, it was equally liable to seizure under the writ whether in the hands of Johnson or the bank. Johnson asserts no interest. The bank by its cashier's letter says the money was received from Thweatt. Aside from Thweatt himself, who does not appear, no one can be more familiar with the facts, no one knows the truth about it better, than Johnson and the appellant.

Neither of them denies Thweatt's ownership, nor attempts to rebut the presumption that he was paying his own money for the land he was buying for himself in his own name. The secretary of appellant testifies that Johnson had at the time an account at the bank; that he was good for his checks, and that after service of the writ, appellant certified the check, "when it occurred to us that Mr. Johnson might draw out the money because of some controversy he might have with other parties." Whether this account was for the exact sum represented by Johnson's check does not appear.

The trial court, with the witnesses and evidence before it, found the money in question to be the property of Thweatt, and in my judgment the evidence fully justifies the finding.

The original letter from Thweatt inclosed notes made by himself apparently for two-thirds of the purchase money and a mortgage executed by himself and wife to secure the same, and he tells the bank he will notify it where to get payment of that part of the purchase price to be paid in cash. A few days thereafter, the cash payment referred to is handed over to the bank by Johnson, with a statement that it is the money to be used in closing up the same transaction and to be paid for the deed of the premises to Thweatt. There is no hint of any other party having the slightest interest in the money so paid to appellant. It is said in Johnson's letter that if the deed is not delivered then the money should be placed to his credit again. But this is entirely consistent with his mere agency and does not indicate any title in himself.

The money was in appellant's hands to make the cash payment on a conveyance of land to Thweatt. The notes and mortgage to be turned over at the same time "for the balance of the purchase money on said lands" were signed by Thweatt. The evidence makes out a *prima facie* case, to say the least, that the money in question was Thweatt's, no matter where it came from or how it got into the bank's hands. It is only by an exercise of imagination that any presumptions to the contrary can be indulged in. And I am compelled to differ *in toto* from the statements in the preceding opinion to the effect that there is no evidence showing "from whom or what source it came," or that Johnson put "his own money" into appellant's hands. The last statement is a pure assumption as I read the evidence. Appellant's counsel themselves go no further than to state that it does not appear in evidence "what interest Johnson had in the deal or why he furnished the money."

A *prima facie* case is made out where it is supported "at first view or appearance." Bouvier's Law Dic. In this

State, proof of mailing notices properly addressed is *prima facie* evidence of their receipt. *Meyer v. Krohn*, 114 Ill. 574 (586); *Young v. Clapp*, 147 Ill. 176 (190). In this last case it is said: "Proof of mailing \* \* \* was *prima facie* evidence that they received it, and no rebutting testimony was introduced to overcome the presumption thereby created."

In the case before us there was no rebutting testimony to overcome the presumption of Thweatt's ownership.

No written propositions to be held as law were presented to the trial court. The only question before us is therefore whether the evidence supports the finding and judgment. *Armstrong v. Barrett*, 46 Ill. App. 193 (194). I am compelled to believe that it does, and can not therefore concur in the reasoning or conclusions of the majority opinion.

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### West Chicago St. R. R. Co. v. Charles W. Williams.

1. *STREET RAILWAYS—Duty of Gripman.*—It is the duty of the gripman operating a cable car in crowded city streets, to be on the lookout, to employ all reasonable means to avoid accidents, and to respect the equal rights of others to the use of the public streets. When injuries are inflicted because of negligence in these respects, the company becomes liable.

2. *DAMAGES—Where \$1,500 is Not Excessive.*—Where the injuries inflicted consist of a running sore, a severe contusion of the flesh and bone of the leg, producing lameness likely to be permanent, cause pain in the chest and in the leg, the coughing and spitting of blood, and impair the injured man's capacity for the work by which he gains his daily bread, \$1,500 is not excessive.

*Action in Case*, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 18, 1900.

VAN VECHTEN VEEDER, attorney for appellant.

GEORGE H. WHITE and ABRAM E. MABIE, attorneys for appellee.

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West Chicago St. R. R. Co. v. Williams.

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MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action for personal injuries. Appellee was a passenger riding upon a cable car operated by the appellant. The alleged injury was caused by a collision of the car in question with a team attached to a beer wagon.

It is urged that appellant was not guilty of any negligence, and that the verdict to the contrary is against the weight of the evidence. The claim of appellant's counsel is that the wagon unexpectedly turned into the south bound or west track at a point about thirty feet in front of the cable car; that the latter was going at the rate of about eight miles an hour, at which rate it would traverse the thirty feet in about twelve seconds, "too short a time in which to stop a heavily loaded car on a wet, slippery track." The undisputed evidence tends to show that the beer wagon in question was drawn by four horses and heavily loaded. It was going north and was on the north bound, or east of the defendant's tracks. A north bound car coming up behind said wagon, the gripman rang his gong as a signal to the wagon to get out of his way. Thereupon the driver of the wagon turned his horses westward upon the west or south bound track, leaving the east track clear so that the north bound car thereon passed by. Almost immediately thereafter the collision occurred, an approaching south bound car, upon which appellee was a passenger, running into the horses and pole of the wagon. There is irreconcilable conflict in the testimony with regard to the distance of the car which caused the injury at the time the driver of the beer wagon began to turn his horses upon the west track on which said cable car was approaching. There is, however, testimony tending to show that the beer wagon with the four heavy horses covered a distance of from thirty-five to forty feet. It was not unreasonable for the jury to believe that to turn this team with its heavy load of several tons, out of the east track and place it squarely in front of the advancing car upon the west track, would take longer than twelve seconds; and that consequently, the car must have been considerably more than thirty feet away, when the gripman had notice or should have

had notice of the danger of collision. We can not say that the evidence did not warrant the jury in finding that the gripman was negligent in not stopping his car in time to avoid the accident. There is certainly considerable evidence tending to sustain such finding. We must regard the verdict as settling the questions of fact in view of the conflicting evidence. It is the duty of the gripman operating a cable car in the crowded city streets, to be on the lookout, to employ all reasonable means to avoid accidents of this kind, and to respect the equal rights of others to the use of the public streets. *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274 (279). When injuries are inflicted because of negligence in these respects, the company becomes liable therefor.

Complaint is made of a modification by the court of an instruction requested by appellant's counsel, to the effect that as modified it was not limited to the issue raised by the pleadings. In this objection we can not concur. The question before the court and jury was whether or not the defendant or its servants were guilty of the negligence which caused the injuries, and we find no serious fault with the instruction to that effect. Nor do we find harmful error in the refusal by the court to give the instruction requested by appellant. The real controversy was as to the alleged negligence, not the experience of the gripman.

The jury returned a verdict for \$2,000. By reason of a remittitur the judgment was rendered for \$1,500. We can not say that where the injuries inflicted consisted of a running sore, a severe contusion of the flesh and bone of the leg producing lameness likely to be permanent; caused pain in the chest as well as the leg, and the coughing and spitting of blood, and impaired appellee's capacity for the work whereby he gains his daily bread, that \$1,500 is excessive.

The judgment of the Superior Court must be affirmed.

**Webster Mfg. Co. v. Nisbett.**

1. **MASTER AND SERVANT**—*What the Servant Must Show in Order to Recover.*—In order to recover for defects in the appliances of the business the servant must establish by proof three propositions: First, that the appliance was defective; second, that the master had notice or knowledge thereof, or should have had; third, that the servant did not know of the defect, and had not equal means of knowing with the master.

2. **PERSONAL INJURIES**—*The Result of a Mere Accident.*—If the injury is the result of a mere accident the plaintiff can not recover therefor.

**Action in Case, for personal injuries.** Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Reversed and remanded. Opinion filed February 13, 1900. Rehearing denied.

**Statement.**—December 23, 1897, appellee, an expert blacksmith, was in the employ of appellant. The injury to appellee, referred to in this case, was inflicted that day while he was engaged in such employment. The principal questions of fact are whether such injury resulted from negligence for which appellant is responsible, or because of negligence on the part of appellee, which contributed to produce such injury, or was the result of an accident for which no responsibility rests upon appellant.

At the time he was injured, appellee and his helper, a fellow servant, were working together making a forging. In doing this the appellee held upon the forging a hammer called a "flatter." The helper struck the flatter with a small sledge or heavy hand hammer. A small piece chipped off the sledge and flew and struck appellee in the left eye and destroyed the sight of that eye. Appellee and his helper had been using these tools several days. Pieces had flaked off said sledge so that it was out of order, and appellee says he knew it was out of order two days before he was hurt. He testified that about the middle of the forenoon of the day he was hurt, he pointed out to the foreman the defect

in the sledge and told him it was not safe, and asked the privilege of repairing it, and that the foreman replied, "Go ahead and use it now, and I will fix it or get Sam to fix it, only don't stop that job, it is in a hurry." This the foreman denied. About two o'clock in the afternoon of the same day appellee and his helper were again using the same tools when appellee was hurt.

Appellee had the experience and ability to repair said sledge. He testified that he was not allowed to do so without orders from his foreman. The foreman testified that it was the custom in that shop that all blacksmiths keep such tools in repair without asking for permission so to do, and this is corroborated by other blacksmiths working in the same shops where appellee was hurt. It appears that this is the general custom in that kind of shops.

J. A. POST and JOHN B. BRADY, attorneys for appellant.

FRANCIS T. MURPHY and THADDEUS S. ALLEE, attorneys for appellee; ROY O. WEST, of counsel.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

In *Howe v. Medaris*, 183 Ill. 288, the Supreme Court quoting from *Goldie v. Werner*, 151 Ill. 551, 556, state the rule relating to the liability of an employer for injuries to an employe by reason of defects in tools or machinery used, very concisely and clearly, as follows (p. 290):

"The rule of law in respect to the burden of proof that is imposed upon a servant in a suit against his master for injuries resulting from defective machinery, etc., is stated in section 414 of Wood on Law of Master and Servant. 'The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: First, that the appliance was defective; second, that the master had notice thereof, or knowledge, or ought to have had; third, that the servant did not know of the defect, and had not equal means of knowing with the master.'"

Appellee testified that he knew before he used the sledge



at the time he was hurt, that it was in such a condition that it was unsafe to use it. He can not, therefore, recover in this case, under the rule approved by the Supreme Court, and quoted above, unless he is, by law, exempted from the operation of that rule by reason of his having reported the condition of the sledge to the foreman and the statement by the foreman as to repairing the same.

Whether the statement said to have been made by the foreman referring to the sledge, "use it now, it will be repaired later," would change the situation so as to relieve the appellee from the application of the rule above quoted, it is not necessary here to determine. It was contended by appellee that the injury was the result of a mere accident. If that be so, appellee can not recover therefor. That appellee was seriously injured there is no doubt. But it does not follow from that fact alone that appellant is liable for the damages arising from such injury. There are some misfortunes and losses for which no one can be held to respond in damages.

It is contended that the injury to appellee was the result of a mere accident, and that the testimony sustained that contention. It was upon that theory and contention that appellant requested the court to give to the jury the following instruction, viz.:

"The court instructs the jury that if you believe from the evidence that the injury to the plaintiff was the result of a mere accident and neither the defendant nor the plaintiff were the cause thereof, you should find the defendant not guilty."

That instruction is quoted and objection thereto urged and argued by counsel for appellant in their printed argument, filed in this court. Counsel for appellee make no reply to this in their printed argument other than a general statement in a single paragraph in which they say, as to this and other objections to instructions urged by counsel for appellant, that every phase of the case was covered by the instruction as given. We do not find that the rule presented by said instruction is covered by any instruction which was given by the court. Under the facts and cir-

cumstances of this case said instruction should have been given.

It appears from what has been said that this judgment can not be sustained. It is therefore not deemed necessary to here review at length the numerous points and elaborate arguments presented by counsel in their printed briefs and arguments filed in this case. No question of law appears which demands consideration from this court further than has been heretofore given.

The judgment of the Superior Court is reversed and the cause is remanded for reasons expressed. Reversed and remanded.

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**McArthur Bros. Co. v. August F. Nordstrom.**

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101	571

1. INSTRUCTIONS—*Excessive Caution on Part of Master, When the Servant has Knowledge of His Peril.*—Where an injured person had worked for about three months at the same kind of work, and must be chargeable with the common knowledge of the perils incident to it, it is error to charge the jury that the duty of knowing and informing the servant of a hazard that he knew as well as the foreman did, was incumbent upon the master, without the exercise of any correlative duty or care upon the part of the servant.

2. SAME—*Employer and Workman—Erroneous and Mischievous.*—An instruction that the giving of an order, generally, to go to work and do something that is a part of the general work on hand, which is not in the doing of it an increase of the hazard of the general job, implies an assurance to the servant that there is no danger in the doing of it, irrespective of how the servant may perform what he is told to do, is not good law in the abstract, and as applied to the evidence in this record, was erroneous and mischievous.

**Action in Case,** for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed February 13, 1900.

AMERICUS B. MELVILLE, FRANK J. CANTY and H. W. MAGEE, attorneys for appellant.

SETH F. CREWS and RALPH CREWS, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellant was a contractor engaged in the work of excavating rock for the channel of the drainage canal. The appellee was an employe of the appellant and worked in the night time. His duties were to assist in filling broken rock into buckets that were carried by a hoisting cable to the dump on the canal bank. This broken rock consisted of large and small pieces that were produced by dynamite explosions, and lay in sloping piles, the clearing away of which was the work appellee was engaged in.

While so at work, a large piece of loose rock slid down the pile and upon one of appellee's legs and broke it, so that its amputation between the knee and ankle became necessary.

To recover compensation for his injuries this suit was brought, resulting in a verdict and judgment against appellant for \$5,750, and this appeal has followed.

The appellee was at work at the foot of the sloping pile, and testified that shortly before he was hurt, the foreman of the gang told him to "clean up" the bucket that had just been filled, so it might be hoisted, and that he was engaged in doing so when the rock that slid forward from the pile caught his leg. The piece of rock that slid forward upon the appellee, lay upon the slope from three to five feet from the bottom.

The tenth and eleventh instructions, given at the request of appellee, were as follows:

"10. The court instructs the jury that it was the duty of the defendant to see that the pile of rock was reasonably safe before ordering the plaintiff to work in that particular place.

And you are further instructed, that if you believe from the evidence that the defendant, through its foreman, by the exercise of ordinary care, could have discovered the condition of the rock which fell upon the plaintiff, then as a matter of law the defendant was presumed to know, because by the law he should have known of the condition of the rock, and it was the duty of the foreman to inform the plaintiff of the condition."

"11. The court instructs the jury that when the master

orders a servant to perform his work, the servant has a right to assume that the master, with his superior knowledge of the facts, would not expose him, the servant, to unnecessary perils; the servant has a right to rest upon the assurance that there is no danger, which is implied by such an order.

The primary duty of the servant is obedience, and he can not be charged with negligence in obeying the order of the master unless he acts recklessly in so obeying.

Whether Nordstrom, the plaintiff, was directed by the foreman to work at the particular kind of work, and at the particular place where he was working at the time when he was injured, are questions of fact for the jury to determine from the weight of the evidence. And if you believe from a preponderance of the evidence, that the foreman ordered the plaintiff to work at the particular work he was doing when injured, then whether he acted recklessly in obeying the foreman's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury."

There is no evidence in the record from which it may be inferred that the work in which the appellee was engaged was especially hazardous, or, at least, that its hazards were not such as were perfectly obvious to every workman.

Appellee had worked for appellant and another contractor on a rock cut of the same kind, for about three months at the same kind of work, and must be chargeable with the common knowledge that large pieces of rock lying upon a sloping pile of loose rock are likely to slide down if the lower part of the pile is disturbed.

The bucket or "skip" which appellee had assisted to fill and had been directed to "clean up" preparatory to its being hoisted, stood at the bottom of the slope, and in working about it the appellee was bound to keep in mind the liability of the upper pieces of stone upon the pile to slide down upon him. Under such circumstances it was not proper to charge the jury, as the tenth instruction does, in effect, that the duty of knowing and informing the appellee of a hazard that he knew as well as the foreman did, was incumbent upon the appellant without the exercise of any correlative duty of care upon the part of appellee.

Coming to the eleventh instruction, it is not the law, as

## Hutchinson v. Croarkin.

there in effect stated, that the giving of an order, generally, to go to work and do something that is part of the general work in hand, which is not, in the doing of it, an increase of the hazard of the general job, implies an assurance to the employe that there is no danger in the doing of it, irrespective of how the employe may perform what he is told to do.

The "cleaning up" of the bucket is shown by appellee's own testimony to have been the usual course of the work whenever the bucket was filled, so that when it came to be hoisted and caused to swing, the loose stones would not fall over the edge and hurt workmen below.

The eleventh instruction is not good law in the abstract, and as applied to the evidence in this record was most erroneous and mischievous.

Appellee's eighteenth instruction sails "close to the wind" upon the subject of pain and suffering, but if there be error in it, such error can be avoided at the next trial by a careful observance of the rule in relation to such matter, recently adopted by the Supreme Court in *Chicago City Ry. Co. v. Anderson*, 182 Ill. 298.

In view of the necessary reversal of the judgment because of the erroneous instructions, we refrain from a fuller discussion of the evidence, especially upon the question of a proper lighting of the place in which appellee worked. Reversed and remanded.

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**Eleanor Hutchinson v. Francis Croarkin.**

1. **FRAUDULENT CONVEYANCES.**—*To What Respect Binding.*—A voluntary conveyance, fraudulent as against creditors, may nevertheless be valid and binding, except as to those who were creditors at the time such conveyance was made.

2. **HUSBAND AND WIFE**—*Where Not Partners.*—The fact that a husband worked for and assisted his wife in the management of a boarding house and hotel does not of itself constitute him a partner, or establish the contention that he was financially interested in the business with her.

3. **EQUITY PRACTICE**—*Measure of Proof.*—Material averments in a

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bill calling for an answer under oath, which are denied by a verified answer, must be proven by the testimony of two witnesses, or that of one witness and corroborating evidence equal to that of another.

**Creditor's Bill.**—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded with directions. Opinion filed February 13, 1900. Rehearing denied.

**Statement.**—This is a creditor's bill wherein appellee is complainant and appellant and others were defendants. Appellee recovered a judgment against Joshua H. Hutchinson, husband of appellant, January 10, 1896. The property which it is sought to subject to the payment of said judgment is capital stock in the Oakland Hotel Company. Said Hotel Company was organized and stock issued in June, 1894. The capital stock of said Hotel Company is \$15,000, divided into 600 shares, of the par value of \$25 each. Appellant subscribed for and received 595 shares of that stock. The decree finds that said Joshua H. Hutchinson is owner of 297 shares of the stock received by appellant, and directs that appellant indorse, deliver and assign to one of the masters in chancery of said court, 297 shares of said stock; that said master sell the same, and that out of the proceeds of such sale the amount due upon said judgment be paid.

In 1883 appellant engaged in the boarding house business on Wabash avenue, Chicago, and at that time invested \$1,800 in that business. In January, 1885, she was married to said Joshua H. Hutchinson. At that time he was employed at a salary of \$20 per week. He continued in such employment about five years after such marriage. In 1886 said Joshua A. Hutchinson sold real estate which belonged to him, for the sum of \$2,200.

At the time of said marriage, in 1885, Mr. Hutchinson had three children. He went at once to live with appellant in said boarding house, taking his children with him. From the time it was commenced by appellant, in 1883, up to 1894, said boarding house business was prosperous, and came to be known as Gresham Hotel.

After terminating his aforesaid employment in 1889, Mr.

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Hutchinson was engaged in real estate business about a year, but made nothing at that. Then he engaged in an enterprise in which he invested \$1,000 in cash, and lost it. In the spring of 1892 he made another business venture, in which he lost \$1,000 more.

In 1894 said boarding house business was transferred to Oakland boulevard, and said corporation organized. Said Oakland Hotel Company has since that time continued said business. Mr. Hutchinson has been employed by that company and paid by it a fixed salary ever since it was organized.

Mr. Hutchinson and his said three children have lived at said boarding house with appellant (and one child born since said marriage) all the time since he was married to appellant, except when one of his children was away attending school. He never paid any board or room rent for himself or family at either of said boarding houses. One of Mr. Hutchinson's daughters received a special education in Chicago, in music. His second daughter received a general education at a college in Ireland. Mr. Hutchinson paid the expenses for both of them.

The testimony does not show that Mr. Hutchinson has had any income or received any money from any source since the termination of his employment in 1889. He has put no money into said boarding house business since that time, if ever. But he has since that time lost \$2,000 in business ventures and has supported and educated his children. Since some time in 1892 he has been engaged in no business other than in connection with the Gresham and Oakland hotels.

ELMER DEWITT BROTHERS, attorney for appellant; HENRY C. NOYES, of counsel.

WILLIAM A. DOYLE, attorney for appellee; FRANCIS E. CROARKIN, of counsel.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

A voluntary conveyance alleged to be fraudulent as

against creditors is valid and binding except as to one who was a creditor at the time such voluntary conveyance was made. *Mixel v. Lutz*, 34 Ill. 382; *Tunison v. Chamblin*, 88 Ill. 378. The judgment in question was not recovered until two years after the alleged fraudulent transfer of stock to appellant. But the claim of appellee had existed since 1891. It was for damages growing out of a personal wrong or tort. A person having such a claim is a creditor of the *tortfeasor* within the meaning of the statute of frauds. *Bougard v. Block*, 81 Ill. 186; *Anglo-American Co. v. Baier*, 31 Ill. App. 653, 657. The rules of law applicable to this case are well settled. The important question to be determined is whether issuing the capital stock in question to appellant was fraudulent as against the rights of appellee.

There was never any agreement by which Mr. Hutchinson was to have any interest, as partner or otherwise, in said boarding house business. But it is contended by counsel for appellee that facts and circumstances appearing in the testimony show that he had such interest.

Appellant was called by appellee and examined as a witness. It appears that she answered all questions propounded to her fully and fairly and without evasion. There is no attempt to impeach or discredit her. Neither is there any testimony seriously conflicting with her statements as to any material fact. She testified that in 1892, after he had failed in his other business ventures, Mr. Hutchinson first undertook the management of the Gresham Hotel and assisted her—that up to that time she had herself managed the business—and that the business did not increase under his management. The testimony does not sustain the contention that Mr. Hutchinson ever put any definite amount into the business, or that he ever in fact contributed anything thereto, other than personal services, and that he had the support of himself and his three children. It does not appear that any accounts were kept as between Mr. Hutchinson and appellant. He and his children lived in the boarding house with her, and up to 1889 he probably contributed more or less toward the family expenses, but nothing since,



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other than his services. True, he joined with her in a lease or in leases of property used as a boarding house or hotel, and for a time the proceeds of the business were deposited in bank in his name and checked out in paying bills in connection with the business. We do not find that any of his separate money went into the business through the bank deposits.

The fact is he never had any money of his own to put into the business after some time during the year 1889. When he worked, his salary was \$20 per week, with which to support his family. He lost in business ventures as much as he received for real estate sold. It does not appear that the business was ever conducted in his name, or in the name of any partnership of which he appeared to be a member. Appellant swears that "Mr. Hutchinson never had any interest in" the Gresham Hotel.

As stated, Mr. Hutchinson has never contributed any money or property to said business since appellee became a creditor. Appellee never extended any credit to Mr. Hutchinson upon the faith of his alleged interest in said business. Appellant established and owned the business. The fact that Mr. Hutchinson worked for and assisted appellant in the management of said business does not of itself constitute him a partner or establish the contention that he was financially interested in said business.

The prayer of said bill is that appellant and the other defendants therein named "may be required upon their several and respective corporal oath \* \* \* to full, true, direct and perfect answers make to all and singular the matters and things herein (therein) before stated and charged, and especially" as to many matters then in said bill of complaint and at length stated and set forth. And further "that the defendants may also several answer make to" the interrogations thereafter "numbered and set forth." Then follows prayer for process commanding the defendants to appear, etc., "then and there to answer this bill, etc., but not under oath (answer under oath being hereby waived)."

The defendants answered under oath. That seems to bring this case within the rule that material averments in the bill which are denied by the answer must be proven by the testimony of two witnesses or that of one witness and corroborating evidence equal to that of another.

But upon the merits of the case and aside from the question as to the effect of the answers under oath the bill should be dismissed for want of equity.

The decree of the Circuit Court is reversed and remanded with directions to dismiss said bill for want of equity. Reversed and remanded with directions.

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### Andrew Gooden et al. v. John Vinke et al.

1. *RECEIVER—In Mortgage Foreclosure.*—Ordinarily in foreclosure proceedings a receiver will not be appointed unless the mortgaged premises are insufficient security for the debt, and the party personally liable for the debt is either insolvent or of very questionable responsibility.

2. *SAME—Power to Lease Premises.*—A clause in an order appointing a receiver in a foreclosure proceeding giving him power to lease the premises for a term not exceeding a year, for such rentals "as he shall deem advisable and just," without notice to the mortgagor or holder of the legal title, and without an order of court made upon notice allowing an opportunity to be heard, is too broad. If it were in the power of the receiver to lease at will, if the debt should be paid or redemption undertaken, injustice might be done.

*Mortgage Foreclosure.*—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed in part and reversed in part, with directions. Opinion filed February 18, 1900.

SAMUEL J. HOWE, attorney for appellants.

SMITH, BLATCHFORD & TAYLOR, attorneys for appellees;  
EDWIN BURRITT SMITH, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court. This is an appeal from an interlocutory order appointing a receiver. Appellees filed a bill to foreclose a mortgage,

and, pending the foreclosure, the order in question was entered.

The trust deed provides that in case of default, the trustee may take possession of the premises, and rent the same "upon such terms as to him shall seem best," make repairs, effect insurance, pay taxes and assessments, and do other things necessary for proper protection of the property.

The affidavits upon which the application for the receiver are based relate solely to the value of the property, and tend to show that the latter is inadequate security for the mortgage debt. This is contradicted by numerous affidavits filed in behalf of appellants, but upon the showing made we can not say that the chancellor did not exercise a just discretion in concluding, as he seems to have done, that the adequacy in value was so uncertain as to make the appointment proper for the protection of the mortgagee's interests.

While it is true that the trust deed does not in express terms authorize the appointment of a receiver, it does authorize the trustee to take possession of the mortgaged premises upon default, as above stated. In such cases upon refusal of the trustee to act, it is said a court of equity may appoint a receiver, independently of any question of depreciation of the property. *High on Receivers*, Sec. 641, 3d Ed. An appointment may also be made in such case even though it does not appear whether the party personally liable is or is not insolvent. *Jones on Mortgages*, 1515 (1st Ed.). Ordinarily, however, it will not be done unless the mortgaged premises are insufficient security for the debt, and the party personally liable for the debt is either insolvent or of very questionable responsibility. *Haas v. Chicago Building Soc.*, 89 Ill. 498 (302).

While we are of opinion, therefore, that the appointment of a receiver in this case is proper, it does not necessarily follow that upon a mere showing by affidavit of facts which may be sufficient to sustain a presumption that the security is inadequate, the receiver should be allowed to exercise an unlimited discretion or appropriate the rents and profits without an express order of court. The maker of the trust

deed and note, may, if he chooses, authorize the trustee to take possession and do whatever "to him shall seem best." But it does not follow that a receiver appointed by order of court over the objection of the mortgage debtor should possess the same powers. The latter is an officer of the court, and although accountable thereto for all his acts as such receiver, is not the appointee of the owner of the property. We are of the opinion that the clause in the order of appointment giving him power to lease the premises for a term not exceeding a year and for such rentals "as he shall deem advisable and just," without notice to the mortgagor or holder of the legal title and without an order of court duly entered upon such notice and an opportunity to be heard, is too broad. If the debt should be paid or redemption be undertaken injustice might be done if it was in the power of a receiver to lease at will. *Silverman v. N. Y. M. L. Ins. Co.*, 5 Ill. App. 124. If a lease is to be made, it should be by order of court so authorizing upon due notice. As it is, the decree vests the receiver with a power which the court should retain in its own hands.

The same is true as to that part of the order directing the receiver to pay interest on the note secured by the trust deed sought to be foreclosed. While the trustee is by the trust deed, and the receiver may be authorized to "collect all rents, issues and profits," their disbursement for such special purpose, except for the protection and preservation of the property, should likewise be upon express order of court upon proper notice.

In these respects we are of opinion the order should be modified. The decree appointing the receiver is therefore affirmed, excepting so much thereof as authorizes the receiver to lease said premises at his own discretion and for such rentals as he may deem just, and directs payment of interest on the note secured by the trust deed sought to be foreclosed.

As to those portions the decree is reversed, with directions to the Circuit Court to so modify it as not to be inconsistent with the views herein expressed. Affirmed in part and reversed in part, with directions.

Wehrheim v. Thiel Detective Co.

August S. Wehrheim v. The Thiel Detective Co.

1. *PRACTICE—Exceptions to Judgments Must Be Preserved.*—Unless there is a bill of exceptions showing that a party excepted to the judgment where the trial was by the court without a jury, or made a motion for a new trial, and saved an exception to the decision of the court overruling such motion where it was by jury trial, a court of review is precluded from considering the sufficiency of the evidence to support the judgment, and can only review such questions as arise upon the pleadings.

2. *SAME—Exceptions, How Preserved.*—The fact that such exceptions appear in the judgment order, or the order allowing an appeal as made up by the clerk and certified by him, is not sufficient; they must be preserved in a bill of exceptions.

3. *SAME—When a Bill of Exceptions is Necessary.*—Where it is desired to assign error upon a decision of the court, the motion and the ruling of the court upon it, together with the exception, must be preserved in the record by a bill of exceptions.

4. *EXCEPTIONS—Object of the Bill.*—It is the object of a bill of exceptions to put the decision objected to upon record for the information of the reviewing court.

*Assumpsit.*—Common counts. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 13, 1900. Rehearing denied.

WILLIAM B. BRADFORD, attorney for appellant.

CHARLES B. OBERMEYER, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court. We are met at the outset in this case with the objection that the bill of exceptions contains no allusion to any exception to the judgment. Examination discloses that the point is well taken. If such exceptions were in fact taken, they are not preserved in the bill of exceptions.

It has been repeatedly held that unless there is a bill of exceptions showing that appellant excepted to the judgment where the trial was by the court without a jury, or made a motion for a new trial, and saved an exception to the decision

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88	551

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105	418

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108	515

ion of the court overruling such motion where there was a jury trial, it will be understood that the defendant acquiesced therein; that the reviewing court is, in the absence of such a bill of exceptions, precluded from considering the sufficiency of the evidence to support the judgment, and can only review such questions as arise upon the pleadings. *Stern v. The People*, 96 Ill. 475 (479); *James v. Dexter*, 113 Ill. 654 (636), and cases there cited; *Martin v. Foulke*, 114 Ill. 206 (207); *Fireman's Ins. Co. v. Peck*, 126 Ill. 494, and cases there cited; *Harris v. The People*, 130 Ill. 457 (463); *Everett v. Collinsville*, 41 Ill. App. 553; *E. St. L. Electric St. R. R. Co. v. Cauley*, 49 Ill. App. 310; *Sands v. Kagey*, 150 Ill. 109; *Ill. C. R. R. Co. v. O'Keefe*, 154 Ill. 511; *Dickinson v. Gray*, 72 Ill. App. 55, and many others.

In *Fireman's Ins. Co. v. Peck*, above cited, which was a case tried without the intervention of a jury, as in the case at bar, the Supreme Court were urged to change the rule, where the proper motions and exceptions appeared in the judgment order, or order allowing an appeal so made up by the clerk and certified by him, and refused to do so, stating that the practice has been so long settled in this State it ought not to be departed from.

The rule is applicable generally to all motions where it is desired to assign error upon the decision of the court thereon, that the motion, the ruling of the court upon it and the exception shall be preserved in the record by bill of exceptions. *C. R. I. & P. Ry. Co. v. Town of Calumet*, 151 Ill. 512, and cases cited. An exception can only be made part of the record by so embodying it in a bill of exceptions. *Martin v. Foulke*, *supra*. In this is found the reason of the rule. It is the object of a bill of exceptions to put the decision objected to upon record for the information of the reviewing court.

It may be that the evidence in this case does not justify the finding and judgment. The proof, so far as the record shows, does not appear to establish as satisfactorily as could be desired that the services sued for were actually rendered, nor the disbursements as charged actually expended,

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although they may have been. But we are precluded from considering the sufficiency of the evidence, and must presume that the finding of the trial court was correct. The judgment must be affirmed.

Andrew Peterson, for the use of, etc., v. The Hartford Fire Ins. Co.

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111	468
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1. *INSURANCE—Tender of Unearned Premiums on Cancellation of Policies.*—Under a policy of insurance providing that the company may cancel its policy by giving five days' notice, the tender of the unearned premium with the notice of cancellation is necessary.

2. *SAME—No Cancellation Without the Tender of the Unearned Premiums.*—Under a policy of insurance providing that the company may cancel its policy by giving five days' notice, a tender of the unearned premium is a condition precedent, and until it is done, there can be no cancellation.

3. *SAME—Cancellation of Policies by the Insurer.*—If the refunding of the premium, or a portion of it, by the insurer, is one of the terms upon which it may cancel the policy, such terms must be complied with before the cancellation is accomplished.

4. *SAME—Consent of a Mortgagee Not Sufficient.*—The consent of a mortgagee of the insured premises to the cancellation of the policy, without the knowledge of the insured, is ineffectual, and can not deprive him of his rights.

5. *SAME—Effect of Mortgagee's Claims.*—A clause in a policy of insurance to the effect that the loss, if any, shall be payable to the mortgagee, gives him a right to bring a suit in the name of the insured for his use, but gives him no right to consent to a cancellation of the policy before a loss occurs.

**Assumpsit, on an insurance policy.** Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded with directions. Opinion filed February 13, 1900.

Mr. Justice HORTON not concurring.

**Statement of Facts.**—March 10, 1890, Andrew Peterson and wife gave the Masonic Building, Loan & Savings Association a mortgage on lot 68, block 22, Chicago and Calumet Canal and Dock Company's Subdivision, Hege-

wisch, Illinois, to secure his bond of that date given to secure a loan of \$2,000 on twenty shares of its stock owned by him as one of its members. Said bond and mortgage provided that Peterson should keep all buildings on the premises insured, and make the loss, if any, payable to the association as its interest might appear.

There was \$2,000 due and unpaid on said bond and mortgage at the time of the trial. March 23, 1893, the Hartford Fire Insurance Company, by William M. Martin, its agent at Hegewisch, issued to and in the name of Peterson its policy of insurance whereby it insured the dwelling house situated on said premises against loss by fire to the amount of \$1,700 for the term of three years from March 24, 1893, for a premium of \$18, which sum Peterson then paid to Martin and took his receipt, as such agent, therefor.

Peterson instructed Martin to deliver the policy to said association, who received and held it as additional security for said loan until August 8, 1893, when Martin (who had failed to pay said premium to the defendant and who had been ordered by the defendant to cancel said policy) went to the office of the association and told its secretary, to whom he had originally delivered the policy, that the Hartford Company had ordered said policy canceled and asked him for it, and, upon receiving it from the secretary, delivered it to the Hartford Fire Insurance Company, and on the back of it, made this memorandum: "Canceled and issued back August 8, 1893."

The Hartford Fire Insurance Company never in any way notified Andrew Peterson of their intended cancellation of said policy, nor that they had canceled it, until after the destruction of said dwelling, and they never returned or tendered any part of the premium that he had paid them for the policy.

August 26, 1893, said Martin, as agent of the Fireman's Insurance Company, issued and delivered to said secretary a policy of insurance whereby the latter company purported to insure Andrew Peterson against loss by fire to the amount of \$1,700 on said dwelling house for the term of



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three years from August 26, 1893, the premium on which policy was never paid for by Peterson or said association, and Peterson never ordered the policy and never knew it had been issued until after the destruction of the house by fire.

October 5, 1893, said house, which was then worth \$1,700 and still owned by said Peterson, was, without his fault, totally destroyed by fire, and Martin, the agent that issued said policies, was present at the fire.

October 17, 1893, Peterson signed and served the following written notice upon the Hartford Fire Insurance Company:

"Please take notice that the dwelling situated on lot 68, block 32, Calumet and Chicago Canal and Dock Company's Addition to Hegewisch, was totally destroyed by fire October 5, 1893, at 11 o'clock P. M., insured in your company as policy 958, issued by your agent, W. M. Martin, March 24, 1893. My notice would have been given you earlier but that your agent, W. M. Martin, was notified and was present at the fire.

ANDREW PETERSON."

On the back of which notice one Taylor, the agent of said company, wrote, and Peterson signed, the following:

"CHICAGO, October 17, 1893.

Now comes Andrew Peterson and states that the within and foregoing statement is not correct, and was signed by him, not knowing that he claimed insurance in the Hartford Insurance Company on his dwelling, and further states that he did not have any insurance on his dwelling in the Hartford, but did have a policy on said dwelling in the Fireman's Insurance Company of Chicago.

(Signed) ANDREW PETERSON."

"Subscribed and sworn to before me this 17th day of October, A. D. 1893.

W. H. TAYLOR, N. P."

It was not admitted as a fact that Peterson swore to said statement. He testified that he did not swear to it, and did not read it or have it read to him.

At the time said notice was served and afterward, said company denied all liability for loss under said policy, and for that reason no formal proof of loss was made thereunder. Neither said association nor any of its agents knew

of, authorized or ratified the statement signed by Peterson on the back of said notice.

Each insurance company claimed that the other company was the only one legally responsible for said loss, and each refused and failed to pay any part of the same.

On the same day that the suit was commenced against the Hartford Fire Insurance Company, suit was also brought in the same court in the name of the same plaintiff for the use of the same beneficiary against the Fireman's Insurance Company for the recovery of insurance under its policy for loss on the same house, which latter suit is still pending and undetermined.

The secretary of said association never received any direction from the board of directors, or president or other officer, to surrender or deliver the Hartford policy or to accept the Fireman's policy.

The slip attached to said Hartford policy permits other insurance, and said policy contains the usual printed clauses, and among others the following :

" This policy shall be canceled at any time at the request of the insured, or by the company giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rates, except that when this policy is canceled by this company by giving notice it shall retain the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance, relating to such interest as shall be written upon, attached or appended hereto.

This company shall not be liable under this policy for a greater proportion of any loss on the described property \* \* \* than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property. \* \* \*

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Peterson v. Hartford Fire Ins. Co.

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Attached to said policy was a building association mortgage indemnity clause in part as follows:

"To be attached to policy No. 958 of the Hegewisch, Ill., agency, and to be construed as originally constituting a part thereof, issued to Andrew Peterson.

It is hereby further agreed, that any loss or damage that may be ascertained and found to be due the assured, or to his heirs, under this policy, or which might be due, except for acts of forfeiture as hereinafter mentioned, shall be payable for his account to the Masonic Building, Loan and Savings Association.

It is also stipulated that this insurance, as to any claim that the said association or the said assured, as long as he is a member of said association, may have in the proceeds thereof, under the foregoing agreement, shall not become void by reason of any act or neglect of the mortgagor or owner of the property insured. \* \* \*

*Provided*, that if the mortgagor or owner shall neglect or refuse to pay any premium on this policy when due, then the said association shall pay the same on demand; \* \* \* the company reserving the right to cancel the policy at any time on the terms in said policy provided, on giving said association ten days' notice of their intention so to do. The foregoing stipulation, however, shall not be held to modify the terms of contribution provided in the printed conditions of this policy, in case of other insurance on the same policy.

Dated March 24, 1893.

WM. M. MARTIN,  
Agent Hartford Fire Insurance Company."

A similar mortgage clause was attached to said Fireman's policy.

D. F. FLANNERY, attorney for appellant.

BATES & HARDING, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This was an action of assumpsit brought by the appellant against the appellee, to recover on the policy of insurance issued by the appellee, mentioned in the foregoing statement of facts.

The case was tried by the court without a jury upon agreed facts of which the foregoing statement is the sub-

stance, and the issues being found for the appellee, a judgment followed against appellant for costs.

There is no question of the effectiveness of the policy issued to appellant by appellee, and the first inquiry that arises is, was such policy canceled.

By its terms the policy might be canceled at any time at the request of the insured, "or by the company giving five days' notice of such cancellation." There is also the provision that when the "policy is canceled by giving notice, it shall retain only the *pro rata* premium."

There is no pretense that the five days' notice of intended cancellation was given by the company, or that any part of the premium paid by Peterson was returned to him.

"We think it is incumbent on every insurance company acting under such a clause as in this policy (in effect the same as here) to tender the unearned premium with the notice of cancellation. The tender must be held a condition precedent \* \* \*" *Peoria M. & F. Ins. Co. v. Botto*, 47 Ill. 516.

"There can be no cancellation unaccompanied by a return of the unearned premium. \* \* \* Until that is done, there can not be \* \* \* a cancellation." *Ætna Fire Ins. Co. v. Maguire*, 51 Ill. 342.

"If refunding the premium, or a portion of it, be one of the terms upon which the company can cancel the policy, there must be such payment, or a tender thereof, to the assured or his duly authorized agent, before cancellation is accomplished." *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615.

"When the policy provides that the \* \* \* insurer may, any time, at its option, cancel it, on giving notice to that effect, and paying a ratable proportion of the premium for the unexpired term, payment of the unearned premium is essential to absolve the company from liability under the policy; and although the policy has been surrendered to the company, yet if the unearned premium has not been paid until after a loss, the company is liable for the loss, and this, even though the assured after the loss, but in ignorance of it, accepts the balance of premium due him for the unexpired term. \* \* \*

The policy is not canceled until the unearned premium is actually received by the assured or his agent; and if, after he receives notice to return the policy for cancellation, he

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sends it to the insurer, but before he receives the return premium a loss occurs, the insurer is liable therefor." Wood on Fire Ins., Sec. 113.

The circumstance that the mortgagee, for whose use this suit was brought, consented to the cancellation of the policy, can not be held to deprive the assured of his right. Peterson, the assured, had no knowledge or notice of the action of the mortgagee, or the insurance company, until after the fire had occurred and his property became destroyed, and it would be a most harsh doctrine to hold that somebody else might surrender his rights without knowledge on his part or notice of any kind to him.

The contract of insurance was with Peterson. His rights were fixed by that contract, and he could not be deprived of them without his consent, except in the manner provided by the contract.

The mortgage clause became a part of the contract, but its effect, so far as questions here involved are concerned, was no more than to give to the mortgagee the right to receive from the insurance company whatever loss or damage Peterson might sustain under the policy. No right existed in the mortgagee under the mortgage clause to cancel the policy, and thus abrogate and destroy Peterson's contract with the insurance company, and any attempted accomplishment of such result by the mortgagee was entirely ineffectual as against Peterson.

The policy not being rightfully canceled, it remained in full force and effect, and was in law, at the time the fire occurred, just as effectual to maintain a suit upon as though it had always remained in Peterson's hands. And such suit was properly brought in the name of Peterson for the use of the mortgagee, to whom the loss was made payable for Peterson's account. Although it be that both Peterson and the mortgagee had separate insurable interests in the property covered by the policy, yet, the only interest that was insured being that of Peterson, the mortgagor, a suit in his name for the use of the mortgagee, to whom the loss was made payable, may be properly maintained. By the terms of the mortgage clause the loss was made payable to

the mortgagee, and gave the benefit of the policy to the mortgagee. Hence, it was proper to sue in the name of the owner of the legal title for the use of the beneficiary. *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354.

What the effect may be upon the Fireman's Insurance Company of the policy that was issued by it upon the premises without the knowledge of Peterson, we need not decide nor discuss; but that it was without effect as between the parties to this suit, we have no doubt. The facts concerning the issue of that policy and the conduct of Peterson in regard to it are set forth in the statement of agreed facts, and do not require special comment at this time.

In our view, Peterson did nothing in connection with that policy that makes it inequitable, or contrary to any recognized rule of law, for him to recover from appellee the loss that it agreed to protect him against, and we therefore will reverse the judgment of the Circuit Court and remand the cause, with directions to that court to enter judgment in favor of the appellant and against the appellee for \$1,700, with lawful interest from December 5, 1893, the date when said loss became payable. Reversed and remanded with directions.

Mr. Justice HORTON does not concur.

### Lina Fischer v. Ellen Tuohy et al.

1. *MORTGAGES—Priority Between Two Made by Same Mortgagor upon Same Premises and Filed for Record on Same Day.*—As between two mortgages made by the same mortgagor upon the same premises, and filed for record on the same day, the one filed first will have priority over the other.

2. *SAME—Exception to the Rule.*—The rule stated, can only be overcome by finding that on the day the mortgages were recorded there existed an indebtedness to support one mortgage and that none existed to support the other.

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Fischer v. Tuohy.

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**Bill to Foreclose Trust Deed.**—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February, 18, 1900.

FRANCIS T. COLBY and LACKNER, BUTZ & MILLER, attorneys for appellant.

JOSEPH B. LEAKE, attorney for appellee Ellen Tuohy.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The principal question remaining in this case, is as to which one of two mortgages held, respectively, by the appellant, Fischer, and the appellee Tuohy, is entitled to priority of lien over the other, against the particular lot one that is covered by both.

Appellees' mortgage covers lot one in Luetgert's subdivision, etc., and appellant's mortgage covers the same lot one, and also lot two of the same subdivision.

The decree gives to appellee Tuohy a first lien upon lot one, and to appellant a first lien upon lot two, and a lien upon lot one subject to the prior lien of appellee.

There is no dispute that the decree is correct as to lot two; the controversy exists only as to priority of lien upon lot one.

Both mortgages were made by the same mortgagor, and were filed for record (by the abstract makers) at the same hour of the same day—that of appellant being stamped by the recorder, as required by the statute, 3 Starr & Curtis, Ch. 115, Sec. 13, par. "First," as document number 1,762,805, and that of appellee as document number 1,762,804.

Appellant's mortgage bears date November 3, 1892, and was given to secure the mortgagor's note for \$20,000, of that date. Appellee's mortgage bears date October 29, 1892, and was given to secure the mortgagor's note for \$30,000, of that date. Both mortgages were acknowledged on the same day, November 4, 1892, which was also the day upon which they were filed for record.

It appears that Luetgert, the mortgagor, applied to the

mortgage brokerage and banking firm of E. S. Dreyer & Co., with whom he kept a running deposit account, to procure for him a time loan upon both lots. This was, as testified by Dreyer, "about five weeks before the papers were executed," or in the latter part of September, 1892. Luetgert wanted as large a loan as the property would bear. The lots were used by Luetgert in his business of sausage-making—the principal buildings and improvements being situated on lot one.

Mr. Dreyer (of E. S. Dreyer & Co.), examined the property and it was decided by him and his business associates that they would loan Luetgert, for themselves or their mortgage buying customers, the sum of \$50,000.

About the first of October, General Leake, as attorney and agent for appellee Tuohy had in his control \$30,000 of appellee's money to loan upon real estate, first mortgage security, and applied to Dreyer & Co., to obtain a mortgage for that amount (he had previously purchased mortgage securities from them) and was told by them that Luetgert desired to obtain a loan of that amount. Leake thereupon went to the premises, the location of which had been stated to him by Dreyer & Co., and there met Luetgert and made an examination of the property with reference to determining its value.

His client, the appellee Tuohy, also viewed the premises shortly afterward and authorized Leake to make the loan if the title was good and the mortgage made a first lien. The result was that Leake reported to Dreyer & Co. that he would accept the loan if the title was good. About that time appellee gave to Leake a power of attorney to check out the \$30,000 from the bank where she had it on deposit, and later, on October 24th, she gave him a check for the amount, which he drew and deposited to his own credit, and notified Dreyer & Co. that the money was waiting for the papers to be executed.

About the time Luetgert's application for a loan was made, Dreyer & Co. received from the appellant, who was then in Germany, a note and mortgage for \$20,000, which



was then overdue, for collection, with directions to reinvest the principal in mortgage securities.

The accrued interest on this mortgage seems to have been promptly collected by Dreyer & Co., and sent to her, with a statement that they had granted to the maker of the mortgage a short extension for the payment of the principal.

In the same letter to appellant, Dreyer wrote:

“As soon as the same (the principal, \$20,000,) is paid I shall reinvest the money again and shall send you the new mortgages, and (I) again assure you that you need not lose any sleep over the new investment which I intend to make, as long as I live; and as I have always invested your money carefully, I shall endeavor to do so in the future, as I know you are depending on the interest of the money for a living.”

The principal was paid to Dreyer & Co. on October 29th, and seems thereafter to have been held by them until the loan to Luetgert was made.

It seems clear enough that from the first, after these two sums of \$30,000 and \$20,000, respectively, became available, it was the plan of Dreyer & Co. to use them in making the loan of \$50,000 to Luetgert, although neither of the lenders had any information or reason to know that either of their loans was intended to be, or was in fact, a supplement to the other. Nor did Luetgert himself. It was not until he came to sign the papers on November 3d, that he knew there were to be two mortgages. And it is plain from all of Luetgert's testimony that he had no personal intention or knowledge concerning priority of lien as between the two mortgages.

What, then, was the intention, in such respect, of appellee, represented by her agent, General Leake, and appellant represented by her agents, Dreyer & Co.?

General Leake testifies, positively, that when he first spoke to Dreyer & Co. about making an investment of the \$30,000, he said appellee desired to place the money upon first mortgage security, and again, at the time he accepted the loan, it was upon the expressed conditions that the title

was good and the mortgage a first lien. Mr. Berger (of Dreyer & Co.), on the other hand, testified, in effect, that nothing was said by General Leake about wishing only a first mortgage.

There are facts and circumstances, however, appearing by the record directly and by legitimate inference, that tend strongly to support Leake's testimony in that regard and to overcome such testimony of Berger.

An abstract of title was furnished by Dreyer & Co. to Leake for examination after the mortgages had been filed for record, upon which the mortgages were made to appear of record. Why was that necessary if not to satisfy Leake that appellant's mortgage constituted a first mortgage lien?

It was not until after the furnishing of the abstracts of title, so continued, that Leake paid over the money to Dreyer & Co. and took Luetgert's note for the amount. Furthermore, Leake first heard of the claim that appellant's mortgage was prior to appellee's, after the bill to foreclose appellee's mortgage was filed. He then immediately saw Dreyer, who told him: "I knew it (referring to appellant's mortgage) was a second mortgage on the factory and accepted it for Mrs. Fischer as a second mortgage." The making of such statement is not denied by Dreyer.

Nor may courts plead ignorance of what is generally known in a locality, that the course of business in making loans in Chicago is to furnish evidence, through abstracts of title continued down to include the date of filing mortgages for record, that mortgages to secure large loans upon real estate constitute first liens before the money is paid over, and that reputable attorneys do not lend their clients money in large sums upon second mortgage security, when especially, as in this case, the client has given directions to accept nothing but a first mortgage lien.

Moreover, it would be a case of singular inconsistency to presume, in the absence of positive proof as to intention, that the taker of a second mortgage would include in his mortgage for the larger amount less property than was covered by the first mortgage made at the same time and

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under the same conditions of title. If it be true that it was intended that appellant's mortgage was intended to be the first lien upon lot one as well as upon lot two, we would have the case of appellee lending at the same time a larger sum upon second mortgage than that secured by the first mortgage, without including lot two in the second mortgage.

If it be said that the same reasoning applies as effectively in favor of appellant, we answer, not so, because the inference from all that passed between appellant and Dreyer & Co. is that she trusted to their judgment in respect of all matters connected with the loan, and it is very plain that they understood her mortgage was a first lien only to the extent of lot two, and was subject to appellee's mortgage upon lot one.

We regard it to be well established by the record that so far as intention is concerned, it was understood and intended by the representatives of both the appellant and the appellee at the time the loans were made, that as to lot one appellee's mortgage should be, and was, a first lien.

But appellant contends, nevertheless, that both mortgages being filed for record at the same hour of the same day, she is prior in time and in right, because, as she insists, her mortgage is supported by an indebtedness from Luetgert to her actually existing at the time the instruments were filed for record, while no indebtedness existed to appellee until November 10th, when Leake paid over appellee's money to Dreyer & Co. for Luetgert, of which facts appellee was charged with knowledge or notice.

We do not consider it necessary to discuss the question of law as to when the lien of a mortgage attaches with reference to the time of payment to or for the use of the mortgagor of the money secured by it, for the reason that we regard it as plainly established by the evidence that appellant's money, although it came to the hands of Dreyer & Co. on October 29, 1892, was not appropriated for or paid to the mortgagor, as such, until after appellee's money was paid over to Dreyer & Co. for Luetgert, on November 10,

1892. In fact, appellant's money was not passed to the credit of Luetgert upon his account with Dreyer & Co. until November 15th. There is evidence of some loose talk, on or about October 29th, that Luetgert might draw upon Dreyer & Co. if he needed to, upon the faith of appellant's money then in their hands, but such conversation must be held to be nothing more than an undertaking entered into by Dreyer & Co. to pay Luetgert's checks if he should draw upon his account with them, they having confidence that the loan would be completed, and when done, that their means for reimbursement would be ample.

Appellant's mortgage was not executed until November 4th, and it is so contrary to the usage among money lenders to place the proceeds of a loan at the disposal of the mortgagor several days in advance of the making of the papers to secure the loan, as to require very explicit evidence to overcome such usage. Berger's testimony shows most satisfactorily that it is not the usage to treat a loan as concluded until after the mortgage has been recorded and the abstract of title continued. Berger further testified that they (Dreyer & Co.) were relying, for appellant, upon the result of Leake's examination of the title; and it was not until after that examination was made and appellee's money paid over, that Dreyer & Co. placed appellant's money to the credit of Luetgert's account in their bank.

If the appropriation of appellant's money to Luetgert had already been made on October 29th, why rely upon an examination of the title not concluded until November 10th?

Whatever, if any, undertaking there may have been between Dreyer and Luetgert to the effect that the latter might use any part of appellant's money upon or about October 29th, it was not acted upon by Luetgert. His deposit account with Dreyer & Co. seems always to have been good without appellant's money, independent of any such agreement, and, as we have already said, no part of appellant's money was credited upon Luetgert's account until November 15th.

Appellee's money was paid over and Luetgert's note for

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Parsley v. Halloran.

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it received on November 10th. It was so done in pursuance of the original understanding that the mortgage given to secure it should constitute a first lien, and in reliance upon the facts shown by the abstract of title that the mortgage was first in order of lien.

As between two mortgages made by the same mortgagor upon the same premises, and filed for record on the same day, the one first filed will have priority over the other. *Brookfield v. Goodrich*, 32 Ill. 363; *Delano v. Bennett*, 90 Ill. 533; *Simmons v. Stum*, 101 Ill. 454.

The rule just stated can only be overcome, under this record, by finding that on the day the mortgages were recorded there existed an indebtedness to support appellant's mortgage, and that none existed to support appellee's mortgage. As we have already stated, the facts and circumstances in evidence do not warrant such a finding.

The equities and the law of the case are with the appellee and the decree of the Superior Court is affirmed.

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**O. G. Parsley v. Mrs. C. Halloran.**

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94 5406

1. *PRACTICE—Placing Cases on the Short Cause Calendar.*—In order to place a case upon the "short cause calendar" the plaintiff, his agent or attorney, must file "an affidavit that he verily believes that the trial of said suit will not occupy more than one hour's time," etc.

2. *SHORT CAUSE CALENDAR—Filing a Copy of the Affidavit Insufficient.*—The right to place a case on the short cause calendar and to proceed with it to trial, out of its order, according to the date of its commencement, depends entirely upon the filing of an affidavit as provided by statute; the filing of a copy of the original affidavit is not sufficient.

Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed February 13, 1900.

ROBERTS & ROBERTS, attorneys for appellant.

FRANCIS E. DONOGHUE, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This was an action originally begun before a justice of the peace from whose judgment an appeal was taken to the Superior Court.

The case was tried upon the "short cause calendar," and the principal contention of appellant's counsel is that such trial was improper for want of compliance with the statutory requisites.

A motion to strike the case from said "short cause calendar" was denied, and the court subsequently overruled a similar motion at the time the case was called for trial.

The statute requires that in order to place a cause upon the "short cause calendar," the plaintiff, his agent or attorney must file "an affidavit that he verily believes the trial of said suit will not occupy more than one hour's time," etc. The trouble in this case is that there does not appear to have been any such original affidavit filed. The notice filed, a copy of which purports to have been left with a clerk in appellant's office, states that "an affidavit of which the foregoing is a copy was duly filed in said suit." But the original of such copy does not in fact appear to have been filed. If it be true that only a copy of the affidavit is on file, the statute was not complied with and the cause was not entitled to a place on the calendar. *Donnerstag v. Loewenthal*, 77 Ill. App. 159. It is possible, of course, that what is by appellee's own counsel in his affidavit of service of notice called a "copy," may be in reality an original affidavit. But if so, there is no evidence of it in the record, and we may not presume that counsel did not mean what he says, when he swears it to be a copy.

The case was placed upon the short cause calendar pursuant to the notice and copy of the affidavit filed September 29, 1898; October 10, 1898, the cause was, on motion of the plaintiff, continued, and it was called for trial November 21, 1898. The statute provides (Chap. 110, Sec. 68) that a suit upon the short cause calendar "may be passed or

## Vietor v. Swisky.

continued for good cause shown the same as other suits; and if so passed or continued it shall lose its place upon such calendar, but may be again placed thereon." A continuance operates to remove a case from the short cause calendar and it can only be replaced thereon by filing a new affidavit and giving new notice in accordance with section 95 of the same chapter. *Gudgeon v. Casey*, 62 Ill. App. 599.

The judgment of the Superior Court is reversed and the cause remanded.

## George F. Vietor et al. v. Harry Swisky et al.

87	583
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1. **PREFERENCES—*Members of the Debtor's Family as Creditors.***—A debtor in failing circumstances may prefer one creditor to another if he does so in good faith, and the fact that his wife is the creditor will make no difference if there is a *bona fide* debt and the conveyance is in good faith. The same rule applies to other members of a family where there is satisfactory proof of a valid subsisting debt.

2. **PROMISSORY NOTES—*Prima Facie Evidence of Delivery.***—A wife received a portion from her father's estate which she loaned to her husband, and a note evidencing the indebtedness of the husband was actually made out and placed in a safe for safe keeping with her knowledge and consent. *Held*, such an act affords *prima facie* evidence of delivery.

3. **GIFTS—*What Are Not to be Considered as Such.***—A testator in a legacy to his married daughter provided that in case she loaned any of the money to her husband, his note should be taken, which was done accordingly. *Held*, that a gift from her to him can not be presumed.

**Creditor's Bill.**—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 13, 1900.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellants.

No appearance by appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court. The object of this suit as stated by appellants' counsel is to reach two pieces of real estate transferred by appellee

Harry Swisky, to his wife, Bertha Swisky. It is charged that such transfer was in fraud of the rights of appellees, who were creditors of Harry Swisky at the time of the transfer, and have since converted their claim into a judgment; and it is sought to apply said real estate in payment of said judgment.

The master found that "beginning about nineteen or twenty years ago, said Bertha Swisky received from her father, Samuel Lieberman, the sum of \$110 per month for a period of eight or nine years;" that "during the year 1888 said Bertha Swisky received from her said father's estate the sum of \$6,000, which said Bertha Swisky gave to said Harry Swisky; that for the said sum so delivered by the said Bertha Swisky to said Harry Swisky, no notes or other evidence of indebtedness were given to said Bertha Swisky;" that no interest was ever paid, or requested on said money, no accounting ever had, and that the money has never been repaid or asked for. The master therefore found the transfer of the real estate to have been made without consideration, holding that the money advanced by the wife is to be treated as a gift, and hence, not in law, a valid consideration for the transfer.

Objections in due form were filed to the report which were overruled by the master, but having been ordered to stand as exceptions in the Circuit Court, they were there sustained and the bill dismissed.

No brief has been filed in behalf of appellees, and we have been compelled to refer to the record for a fuller understanding of some parts of the testimony than could be gained from the abstract. We find there testimony of Swisky to the effect that he made out a note to his wife and that it is lost; that he put it in his safe and "told her of it." The last phrase was stricken out by the master as not responsive, but the abstract is scarcely adequate in condensing this testimony into, "made out a note but never delivered it to her." The witness then proceeded to make an explanation. It had been previously testified by Mrs. Swisky that she had received the \$6,000, which in 1888 or thereabouts,



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she advanced to her husband, from or through the law firm of which appellant's counsel, or some of them, were members, they having had charge of her father's estate. Apparently, with this fact in mind, the witness said :

"Under my father-in-law's will, when he left the money, he put it in his will—Mr. Lucas will find it there in their office—he says any money loaned by his daughter to her husband, he must give her a note; so I made out a note according to his will and put it in my safe."

This testimony, to which no objection was made, appears to be entirely omitted from the abstract. Yet we regard it as material in the consideration of the alleged error which appellant's counsel urge in the finding and judgment complained of.

The authorities referred to in appellant's brief are quoted as sustaining the proposition that where money is advanced for which no evidence of indebtedness is given, no interest asked or paid, and no accounting, it must be considered an absolute gift as against creditors of the assignee. But here is testimony uncontradicted that evidence of the debt was given. In *Schuberth v. Schillo*, 177 Ill. 346, it is said :

"A debtor in failing circumstances may prefer one creditor to another, if he does so in good faith, and the fact that a wife is the creditor will make no difference if there is a *bona fide* debt and the conveyance is in good faith."

The same rule, it is said, applies to other members of a family, where there is a clear and satisfactory proof of a valid subsisting debt. This must be determined from the conduct of the parties and the circumstances in evidence. The testimony here tends to show that a note evidencing the indebtedness of Swisky to his wife for the money it is conceded she received from her father's estate, was actually made out, and if it is true that it was placed in the safe for safe keeping with her knowledge and consent, such act would afford *prima facie* evidence of delivery. There is no evidence in this case, as in *Dillman v. Nadelhoffer*, 162 Ill. 625 (629), that the wife had received from her husband more than the amount of the debt. She testifies that notwithstanding the conveyance of the real estate, "he still owes

me" (R. p. 90, not abstracted), and if we correctly understand the evidence as to value of the real estate; such must be the fact. If, as was testified, the will of Mrs. Swisky's father provided for the giving of notes for her husband's indebtedness to her, and this was done accordingly, a gift from her, can not, we think, be fairly presumed; certainly not if that was a condition of the bequest.

The exceptions to the master's report relate to conclusions of fact as well as to the law applicable, and we find no error in the action of the Circuit Court in sustaining them as to appellee Bertha Swisky. The judgment is accordingly affirmed.

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### **Kingsville Preserving Co. v. August Frank et al.**

1. ACCORD AND SATISFACTION — *Requisites of.*—To constitute an accord and satisfaction of a claim unliquidated and in dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition.

*Assumpsit, for goods sold.* Appeal from the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed February 13, 1900.

WILBER, ELDRIDGE & ALDEN, attorneys for appellant.

No appearance by appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This was an action of assumpsit, brought by the appellant against the appellees to recover a balance of \$211.50, claimed under a contract for the sale of canned fruits by appellant to appellees.

At the close of the evidence the court, upon the motion of the appellees, instructed the jury to return a verdict finding the issues for the defendants (appellees), which was

## Kingsville Preserving Co. v. Frank.

accordingly done, and thereupon the court rendered judgment on the verdict and against the plaintiff (appellant) for costs.

The verdict was apparently directed upon the theory that an accord and satisfaction of the claim had occurred as a conclusion of law under the facts of the case—there being upon the record no other accounting for the instruction.

There can not be any doubt, from the evidence, but that a balance of \$211.50 in excess of the \$272.55 that was sent by appellees and received by the appellant, was claimed to be due to the appellant at the time of the remittance and receipt referred to, nor but that appellees knew that such amount was claimed by appellant.

Under such circumstances the appellees sent the following letter to appellant:

“CHICAGO, May 8, 1893.

KINGSVILLE PRESERVING Co., Kingsville, Ontario, Canada.

GENTS: We have this day mailed to City Savings Bank, Detroit, per instructions from you, our check for \$272.55, in payment for corn, as follows:

400 doz. Boy Brand at 69c.....	\$276 00
Less 5 doz. samples cut.....	3 45

\$272 55

for which please send receipt in full.

Yours, etc.,

FRANK BROS.,  
H.”

The amount so remitted was retained by the appellant.

The question then is, was there an accord and satisfaction, as a conclusion of law, under such a condition of facts? The doctrine of accord and satisfaction was treated of by us at considerable length in *Lang v. Lane*, 83 Ill. App. 543, and we refer to the opinion in that case for the law applicable to this one upon that subject. It need not be repeated.

Under the doctrine there laid down, it is plain that the letter above quoted did not make the acceptance of the sum remitted so plain a condition as that the acceptance of the amount would involve the acceptance of the condition; and

therefore the retention of the money by appellant did not bind it as by an accord and satisfaction.

It was error for the Circuit Court to direct the jury to find the issues for the defendant, and the judgment will therefore be reversed and the cause remanded for another trial. Reversed and remanded.

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**James R. Lewis v. The People, etc., ex Relatione Carrie Catlin.**

1. **QUESTION OF FACT—*In Bastardy Proceedings.***—In bastardy proceedings the question as to whether the defendant is the father of the bastard child is a question of fact for the jury.

2. **PRESUMPTIONS—*Where a Child is Shown to Have Been Alive.***—Where a child is shown by the evidence to have been once alive, and there is no evidence tending to show its death, the presumption is that it is still living.

**Bastardy Proceedings.**—Appeal from the Criminal Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 8, 1900.

PLOTKE & FRAZIER and J. B. LIGHT, attorneys for appellant.

CHARLES S. DENEEN, State's Attorney, for appellee; FREDERICK L. FAKE, JR., Assistant State's Attorney, and M. E. AMES, of counsel.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is a bastardy proceeding brought by the People of the State of Illinois ex rel. Carrie Catlin against appellant. The jury found by their verdict that Carrie Catlin was delivered of a bastard child and that appellant "is the real father of said child." A motion for a new trial was overruled and judgment entered against appellant for the full amount pro-

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Lewis v. The People.

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vided by statute, viz., \$100 for the first year and \$50 per year for the succeeding nine years, payable "in equal quarterly payments to the clerk of the court." It is to reverse that judgment that this appeal is prosecuted.

Appellant does not take the stand or speak as a witness. There is no testimony in conflict with that of the relator as to the fact of appellant's intercourse with her. The only testimony offered by defendant is that of one Arthur Ludwig, who testified that he had sexual intercourse with the relator at such times as that it might be that he was the father of the child. The relator testified that she had never had sexual intercourse with any one except appellant. Whether appellant was the father of said child was a question of fact for the jury. We see no reason in the testimony for disagreeing with the jury in the finding upon that question.

The only other point urged by appellant is that, as he contends, there is no proof that the child is alive. The judgment is "for the support, maintenance and education of said bastard child." It is not a fine. Neither is the judgment in favor of the relator. Money paid thereon must be expended for the support of the child as shall be directed by the court.

The child was born alive. One witness testifies to having seen it when it was about three and one-half months old. Then it was alive and well. There is no evidence tending to show its death. In law it is presumed to be still living. About a year prior to the trial one of the attorneys for appellant applied to the witness who knew and testified as to the whereabouts of the child, to ascertain where it was. It is probable that if the child was not then living its death would have been established at the time of the trial.

Perceiving no error in this record, the judgment of the Criminal Court is affirmed.

87	590
899	572

**W. Dyniewicz v. N. C. Benziger and L. G. Benziger,  
doing business as Benziger Bros.**

1. **SHORT CAUSE CALENDAR—Practice.**—Where there is a rule of court providing that no cause shall be noticed for the short cause calendar when not at issue, it is error to deny a motion to strike it from such calendar or to otherwise dispose of it as a cause properly upon that calendar.

Error to the County Court of Cook County; the Hon. WALES W. WOOD, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 5, 1900. Rehearing denied.

**Statement.**—This suit was begun before a justice of the peace. From his judgment the plaintiff in error took an appeal to the County Court by filing an appeal bond in the County Court. The bond was filed upon the 19th day of July, 1898, but the transcript of the judgment of the justice of the peace was not filed in the County Court until the 14th day of October, 1898. This was of the October term of that court. Upon the 22d day of October, 1898, also of the October term of the County Court, the defendants in error filed the customary short cause affidavit, and gave notice thereof to the attorneys for plaintiff in error. The first day of the term of the County Court next after the 14th day of October, 1898, was the 14th day of November, 1898. Upon that day, viz., November 14, 1898, the first day of the November term of the court, the cause appeared upon the short cause calendar. Thereupon counsel for plaintiff in error presented a motion to strike the cause from the short cause calendar upon the ground that when the affidavit was filed and the cause was placed upon the calendar at the October term, 1898, it was not at issue, the appeal from the justice of the peace not having been perfected by the filing of the transcript ten days before the beginning of such term; and upon the further ground that the rules of the County Court then in effect provided that "no cause shall be noticed for trial on such calendar until the same is at issue."

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Dyniewicz v. Benziger.

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The motion was overruled and the cause was then called for trial. The counsel for plaintiff in error thereupon renewed the motion to strike the cause from the short cause calendar, and upon the motion being again overruled, they withdrew from any participation in the trial.

The trial resulted in a judgment for defendants in error. From that judgment this appeal is prosecuted.

CZARNECKI & KORALESKI, attorneys for plaintiff in error.

LENNARDS & AUSTIN, attorneys for defendants in error.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The question presented upon this appeal, and determinative thereof, is as to whether it was error to deny the motion of plaintiff in error to strike the cause from the short cause calendar, and hence error to dispose of the suit as a cause properly upon that calendar. We are of opinion that this question is definitely settled by the decision of our Supreme Court in *Vallens v. Hopkins*, 157 Ill. 267.

It appears from the record that there was a rule of the County Court in effect when this cause was disposed of, that no cause should be noticed for the short cause calendar when not at issue. This cause was not at issue upon October 22, 1898, for the transcript of the judgment of the justice of the peace had not then been filed ten days before that term. The reasonable application of the court rule and the effect of the decision above cited, leave no room for doubt that it was error to deny the motion to strike the cause from the short cause calendar and to proceed to a disposition of the suit.

Nor was the right of plaintiff in error in this instance waived by delay in presenting his motion. The first day upon which the County Court could properly enter such orders in the cause was November 14, 1898. Upon that day, before the cause was called for trial, and again when it was so called, the motion was interposed. The judgment is reversed and the cause is remanded.

## Charles J. Bour v. Chicago and Wellston Coal Co.

1. **APPELLATE COURT PRACTICE**—*Where No Question of Law is Presented for Determination.*—In cases where a jury has been waived and the cause submitted to the judge for trial, it is only where some ruling of the court upon propositions of law submitted to it, or upon other questions of law arises upon the trial—such as the admissibility or rejection of evidence, etc.—that the Appellate Court can inquire or examine into the correctness of the law upon which the case was decided.

2. **SAME—Presumptions.**—Where a case is submitted to the court for trial without a jury and no propositions of law asked, or where the trial is by jury and no instructions given, it will be assumed that no mistake of law was made at the trial, and that the finding or verdict is right, unless it is so manifestly against the evidence that it ought not to stand.

3. **SAME—Force and Effect of the Finding of the Trial Court.**—In determining whether there is error upon the facts, the finding of the court has all the force and effect of the verdict of a jury and will not be disturbed unless for reasons sufficient to set aside a verdict.

**Assumpsit.**—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Mr. Justice HORTON dissenting. Opinion filed February 27, 1900.

W. H. RICHARDSON, attorney for appellant.

BANGS, WOOD & BANGS, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This was a suit to recover the price of twelve tons of coal that was delivered by appellee, by order of a third party, to a flat-building owned and operated by the appellant, and used by appellant, for the purpose of heating the same. The case was tried without a jury, and judgment for seventy-two dollars against the appellant was recovered.

No proposition of law was submitted to the trial court to be ruled upon, as might have been done under section 42 of the practice act, and hence no question of law is presented for our determination, unless the errors assigned as

87	592
90	105
90	418
90	453
87	592
94	165
94	316



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to the admission or exclusion of evidence necessarily involve the consideration of such a question. *Keating v. Springer*, 146 Ill. 481.

In cases where a jury has been waived and the cause submitted to the court alone, it is only where some ruling of the court, upon propositions of law submitted to it, or upon other questions of law—such as the admissibility or rejection of evidence, etc.—arising upon the trial, that this court can inquire or examine into the correctness, or otherwise, of the law upon which the case was decided. Without some such ruling and appropriate exception, we are bound to presume that the law of the case was correctly decided, and we are at liberty only to inquire whether the finding is sustained by the evidence in the case.

The method of saving questions of law for review by this court or by the Supreme Court, in cases submitted to the trial court without a jury, by requesting that court to hold written propositions of law, is analogous to that of asking instructions to the jury upon the law of the case that is submitted to them.

Where in the one case no proposition of law is asked to be held, and in the other no instruction to the jury is given, it will be assumed, on review, that no mistake of law was made at the trial; and that the finding or verdict is right, unless it is so manifestly against the evidence that it ought not to stand. *Hobbs v. Ferguson's Estate*, 100 Ill. 232; *National Bank v. LeMoyne*, 127 Ill. 253; *Smith v. Dael*, 29 Ill. App. 290; *Davies v. Phillips*, 27 Ill. App. 387; *Bright v. Kenefick*, 69 Ill. App. 43.

And in determining whether there be error upon the facts, the finding of the court has all the force and effect of a verdict by a jury, and will not be disturbed unless for reasons that will overturn the verdict of a jury. *Kimball v. Doggett*, 62 Ill. App. 528; *Armstrong v. Barrett*, 46 Ill. App. 193; *Brown v. Galesburg P. B. Co.*, 32 Ill. App. 650.

The only assigned errors that are not waived by a failure to argue them (*Armstrong v. Barrett*, *supra*, *Cook v. Moulton*, 59 Ill. App. 428), are such as apply to the law of the whole

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case, and to the sufficiency of the evidence, and as the law applicable to the case generally, must, in the absence of any proposition of law upon which a ruling might have been had, be presumed to have been decided correctly, there is nothing before us except to inquire if the evidence sustains the finding.

On the facts, it is not clear that the appellant is liable for the coal, and perhaps as an original question, we might have found he was not; but the trial judge having had the advantage denied to us, of seeing the witnesses and observing their manner of testifying, and the evidence being conflicting upon the essential points in the case, we can not say, under the rules we have referred to, that the finding is so manifestly against the evidence as to justify a reversal of the judgment. *Davies v. Phillips*, 27 Ill. App. 387; *Brown v. Galesburg P. B. Co.*, *supra*.

The judgment will therefore be affirmed.

Mr. Justice HORTON dissents.

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### Chicago Office Building v. The Lake St. Elevated Ry.

1. *STREETS—Elevated Railroad Not an Additional Servitude.*—An elevated railroad for the transportation of passengers from place to place in a city is a legitimate use of a city street and is not an additional servitude thereon.

2. *ABUTTING OWNERS—Elevated Railroads—Damages.*—Under the constitution of 1870 owners of property abutting on a street in which an elevated railroad is constructed are entitled to recover such damages as they sustain by such construction.

*Trespass on the Case.*—Appeal from the Circuit Court of Cook County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded with directions. Opinion filed February 26, 1900.

PECKHAM, BROWN & PACKARD and PIKE & GADE, attorneys for appellant.

KNIGHT & BROWN, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant was plaintiff and appellee defendant in the trial court, and will be so referred to in this opinion. The appeal is from a judgment sustaining a general demurrer to the plaintiff's declaration and for costs. It is averred in substance in the declaration that the plaintiff is lessee for a term of ninety-nine years and two months from February 20, 1892, and in possession of certain premises described in the declaration, situated on the southwest corner of Clark and Lake streets, public streets of the city of Chicago, and having a frontage of eighty feet, more or less, on each of said streets; that there was at the time of the alleged injury a modern seven-story building on the premises, containing many rooms and apartments fitted up at great expense as stores and offices, and especially valuable for such purposes by reason of the location of the premises, and that they were, in part, so used by tenants, and plaintiff derived a large rental therefrom; that Lake and Clark streets are each about eighty feet in width, and were a great element of value to said premises; that during the year 1895, the defendant caused to be erected in Lake street, in front of said premises, an elevated railroad, the same being a structure of wood and iron, etc., and an elevated railway station house and building, with water closets, and covered steps or stairs leading from the sidewalks on said streets up to said railway station, along and upon Lake street in front of and adjoining said premises, which elevated railroad and station are of a permanent nature, are of the height of about thirty feet and of the width of about sixty feet, and abut up and close to said premises; that the defendant is the owner of a large number of steam locomotives and passenger cars, and that about one thousand trains propelled by said steam locomotives pass and reposs on said elevated railroad every day; that December 28, 1894, the defendant licensed the Union Elevated Railway Company to use for its own trains, and for

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the trains of three other elevated railroad companies, the said elevated railroad and station house for a term of fifty years from said date, and each of said elevated railroad companies will shortly commence to operate its trains on said elevated railroad. It is further averred in the declaration that, by reason of the premises, light and air will be excluded from said building, and a great part thereof is and will be rendered dark, close, uncomfortable, unwholesome and unfit for offices, and the access to said premises has been and will continue to be greatly impaired and interfered with, etc. Other elements of damage are averred, and it is alleged, "by all which things the rental and salable value of said premises has been, is and will continue to be lessened and reduced." The declaration contains two counts and is quite lengthy, but the foregoing statement is sufficient for the consideration of the legal questions presented.

The contention of the defendant's counsel is, that no recovery can be had for mere consequential damage accruing to the owner of property abutting on a street, by reason of the construction and operation in the street of an elevated railway. Their argument, elaborated at great length, may be concisely stated thus: Lake street was dedicated by the remote grantor and privy in estate of the plaintiff, or acquired by the public, as a public street, and for all purposes for which a public street may legitimately be used.

The use of a public street for an elevated railroad for the transportation of passengers from place to place in the city, is a legitimate use.

Therefore, the use of Lake street for the elevated railroad in question is within the purpose for which the street was dedicated to, or acquired by the public, and there can be no recovery.

A large part of the argument of counsel for defendant is devoted to the advocacy of the proposition that the use of a street for an elevated railroad is not an additional servitude; but this is included in the major and minor premises of the argument, as above stated, because, if the street was dedicated or acquired for all legitimate uses as a street, then

if its use for an elevated railway is a legitimate one, it can not be a servitude additional to that for which the street was dedicated or acquired.

While we are of opinion that the construction and operation of an elevated railway in a street, for the convenience of the public and the transportation of persons from place to place in the city, is not an additional servitude imposed on the street, we can not concede that the owner of property abutting on the street, who suffers special damage by reason of the construction and operation of the railway, can not recover. Counsel assume, erroneously, as we think, that if there is no additional servitude, there can be no recovery. This doubtless was the rule prior to the adoption of the present constitution in cases where there was no direct injury to the *corpus* of the property. *Moses v. Pitts., Ft. W. & C. R. R. Co.*, 21 Ill. 522; *Murphy v. City of Chicago*, 29 Ib. 279.

But such has not been the rule since the adoption of the present constitution, which provides that "Private property shall not be taken or damaged for public use without just compensation." In *City of Pekin v. Brereton*, 67 Ill. 477, which was an action to recover damages for injury to property abutting on a street, by reason of grading done for the construction of a railway authorized by the city, the court say :

"But the constitution of 1870, in force when the injury of which complaint is made was done, provides, in the Bill of Rights, section 13 of the second article, that 'private property shall not be taken or damaged for public use without just compensation.' It will not be denied this provision rests upon a great principle of right and justice which would doubtless be applied in every proper case without constitutional sanction. With this clause of the constitution before us we can not entertain a doubt of appellees' right to recover to the extent of the damage they have sustained. The case of *Moses v. Pittsburgh, Ft. Wayne & Chicago Railroad Co.*, 21 Ill. 516, and that of *Murphy v. City of Chicago*, 29 Ib. 279, were decided long anterior to the adoption of the present constitution, and are essentially modified by *Indianapolis, etc., Railroad Co. v. Hartley*, 67 Ill. 439."

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In *Stack v. City of East St. Louis*, 85 Ill. 377, 381, the court reiterated the view that the *Moses* and *Murphy*-cases had been "essentially modified."

In *Rigney v. City of Chicago*, 102 Ill. 64, the court, commenting on the constitutional provision quoted *supra*, say:

"The addition of the words 'or damaged' can hardly be regarded as accidental, or as having been used without any definite purpose. On the contrary, we regard them as significant and expressive of a deliberate purpose to change the organic law of the State. Nor were they used simply to conserve existing rights, as has been suggested by counsel, but on the contrary, in our judgment, they declare a new rule of civil conduct, from which spring new rights which did not exist under the constitution of 1848."

The court further say, *Ib.* 78:

"Under the constitution of 1848, it was essential to a right of recovery, as we have already seen, that there should be a direct physical injury to the *corpus* or subject of the property, such as overflowing it, casting sparks or cinders upon it, and the like, but under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action."

In the same case the court, after citing a number of cases, decided since the adoption of the present constitution, say:

"The conclusion reached in all these cases is distinctly placed upon the ground that the new constitution has enlarged the right of recovery, by extending its provisions to a class of cases not provided for under the old constitution," etc. *Ib.* 80.

In *C. & E. I. R. R. Co. v. Loeb*, 118 Ill. 203, 212, the distinction between the law as it was under the old, and as it is under the present constitution, is pointed out.

*C. & W. Ind. R. R. Co. v. Ayres*, 106 Ill. 511, was an action by the owner of property abutting on a public street to recover damages alleged to have been occasioned to the property by the construction and operation of a railroad in the street. The court say:

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"Numerous cases have been referred to on each side to sustain their several positions. It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney v. City of Chicago*, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our constitution. The conclusion there reached was, that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party damaged may recover. We regard that case as conclusive of this question. The case of *Pittsburgh & Fort Wayne R. R. Co. v. Reich*, 101 Ill. 157, is in point on this question of damages, and the case of *City of Chicago v. Union Building Association*, 102 Ill. 379, also reviews the authorities, and approves the doctrine of *Rigney v. Chicago*, *supra*. These cases, therefore, overrule the doctrines of the earlier cases."

In *Chicago v. Taylor*, 125 U. S. 161, the court, after quoting the language above quoted, say:

"Our attention has not been called to, nor are we aware of any subsequent decision of the State court giving the constitution of 1870 an interpretation different from that indicated in *Rigney v. Chicago*, and *Chicago, etc., Railroad Co. v. Ayres*. We concur in that interpretation. The use of the word 'damaged' in the clause providing for compensation to owners of private property appropriated to public use, could have been with no other intention than that expressed by the State court."

We are not aware of any decision of the Supreme Court since the adoption of the present constitution, in which the court has even intimated that the owner of property abutting on a street which is damaged by the construction and operation of a railroad in the street, has not a remedy at law. In *Doane v. Lake Street Elevated R. R. Co.*, 165 Ill. 518, which was a bill to enjoin the construction of the road, the court, while holding, as the court had held in pre-

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vious cases, that a bill could not be maintained, such construction having been authorized by the municipality, say:

"Such owner can not maintain a bill to enjoin the same until the resulting damages to his property are ascertained and paid; his remedy is by action at law for such damages." Ib. 518, citing, among other cases, the following: Stetson v. C. & E. R. R. Co., 75 Ill. 74, 80; P. & R. G. R. R. Co. v. Schertz, 84 Ib. 135, 140; Penn. Mut. L. Ins. Co. v. Heiss, 141 Ib. 35, 55; Corcoran v. C., M. & N. R. R. Co., 149 Ib. 291, 297; White v. W. S. El. R. R. Co., 154 Ib. 620, 625; C., B. & Q. R. R. Co. v. W. C. St. R. R. Co., 156 Ib. 255, 273, each of which supports the text of the opinion. The Stetson case was a bill to enjoin the construction of the railroad, which the court held could not be maintained, saying:

"The party will be left to his action. When he has settled the question of his right to damages, and ascertained the measure in an action at law, if any reason exists why he can not have execution of the same, equity will assist him, but not before."

In Penn. Mut. L. Ins. Co. v. Heiss, *supra*, the court say:

"The land owner is remitted to his action at law to recover his damages. The right to recover damages for injury to private property occasioned by the occupation of a public street by a railroad, or the taking of other property for the public use, is secured to the property owner by the provision of the constitution quoted," referring to the provision quoted in the opinion.

In Doane v. Lake St. El. R. R. Co., 165 Ill. 510, counsel for the defendant here was counsel for the railroad company, and one of the points he made was that there was an adequate remedy at law, and the court so held. Ib. 514, 518.

In City of Olney v. Wharf, 115 Ill. 519, relied on by counsel for defendant, the court, while holding that there could be no recovery against the city for damages occasioned to property abutting on the street, by reason of the construction of a railroad in the street by authority of the city, say:



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"If appellee or any other lot owner on the street has been damaged by the construction or operation of the railroad, the city is in no manner liable, but the liability for all damages sustained must fall upon the railroad company."

The cases cited illustrate the proposition that the absence of the element of additional servitude does not preclude recovery.

The material averments of the declaration which are well pleaded must be assumed to be true for the purpose of passing on the demurrer. From these averments it appears that the damage to the plaintiff's property complained of, was for a public improvement; that the railway, as constructed, greatly impairs the access of light to the plaintiff's building, causing it to be dark; that the access of air thereto is greatly impaired; that access to its premises is materially obstructed; that large quantities of smoke, dust, cinders and ashes have been, are and will continue to be thrown on the building and premises, etc., and thereby the rental and salable value of the premises has been, is and will continue to be lessened and reduced. These and other averments in the declaration bring the plaintiff's case within the constitutional provision requiring compensation, as construed by the Supreme Court. *City of Pekin v. Winkel*, 77 Ill. 56; *City of Shawneetown v. Mason*, 82 Ib. 337; *City of Elgin v. Eaton*, 83 Ib. 535; *Stack v. City of E. St. Louis*, 85 Ib. 377; *Rigney v. City of Chicago*, 102 Ib. 64, 82.

The judgment will be reversed and the cause remanded, with directions to the trial court to overrule the demurrer. Reversed and remanded, with directions.

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**Franz J. Weber, August Lenzen and Martin Bock v. Henry L. Hertz, Coroner, etc., use of James Pease, Sheriff, etc.**

1. *REPLEVIN—Of Partnership Property.*—When the property of a partnership is levied upon, replevin can not be maintained by one of the partners against the officer making such levy.

2. *SAME—Practice in Suits on the Bond.*—In this State, when a

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replevin suit is dismissed or the plaintiff therein suffers a non-suit, he may show, in defense of a suit upon the replevin bond, such facts as would establish his right to maintain the suit in replevin, and if it appear in such suit that the replevin could not have been successfully prosecuted, then a *prima facie* right to recover upon the bond is established.

**Debt, on replevin bond.** Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 27, 1900.

**Statement.**—The appellant, Franz J. Weber, received from Albert Zacharias two bills of sale purporting to convey to said Weber certain interest in personal property. The first is dated November 5, 1891, and purports to convey as therein described, said Zacharias' "half interest of restaurant and saloon business carried on and known as Nos. 80 and 82 Fifth avenue in the city of Chicago." The other is dated November 16, 1891, and purports to convey certain goods and chattels therein specifically described, such description concluding with the words "and all other liquors and jugs with contents contained in saloon at premises known as 80 and 82 Fifth Ave."

Said Weber took possession jointly with said Zacharias of said restaurant and saloon business on or about the date of said first bill of sale. Afterward, on November 21, 1891, several judgments were entered against said Zacharias and executions issued thereon. James H. Gilbert, then sheriff of Cook county, by F. Leibrandt, deputy, the same day, and by virtue of said executions, levied upon all the right, title and interest of said Zacharias in all of the personal property contained in said saloon, and took possession thereof. Said Weber thereupon commenced a suit in replevin against said sheriff and his said deputy, and replevied all of the property levied upon. At the trial of such replevin suit said Weber took a non-suit. Thereupon, this suit was brought upon the replevin bond given in said replevin suit, the appellants being the parties who executed such bond. Said Weber was in the possession of

said property at the time the same was levied upon as aforesaid.

KRAFT & RUST, attorneys for appellants.

EDGAR BRONSON TOLMAN, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

Counsel for appellants, in his printed argument, makes this statement, viz.:

“At the outset we desire to call the court’s attention to the fact that it appears from all the testimony, uncontradicted, that Franz J. Weber paid \$1,000 to become a copartner of Albert Zacharias, on or before the 5th day of November, 1891.”

The material issue is whether or not said second bill of sale is fraudulent and void as against judgment creditors of said Zacharias. The case was tried by the court without a jury, and the finding of the court was against the validity of said second bill of sale. It is not necessary to here formally review at length the testimony upon this question. The trial court saw the witnesses and heard them testify. The finding is not so against the weight of evidence as to justify a reversal of the judgment on that ground.

The second bill of sale being set aside as to the judgment creditors of Zacharias, then, as to such creditors, the interest of appellant Weber in the property levied upon, as stated by his counsel, was that of a copartner; apparently all of the property of the partnership was levied upon. It seems to be conceded by counsel that such is the fact. In such case, and as to such property, replevin can not be maintained by one partner against an officer making a levy upon the interest of the other partner. (James v. Stratton, 32 Ill. 202; Wells on Replevin, Secs. 166 and 167.) No question is presented here as to the rights of firm creditors.

We do not find from the abstract when the judgment was entered in this case. But we see that December 2,

1898, and after the entry of judgment the court entered the following order, viz:

"The cause coming on again to be heard, the court, on his own motion, orders that the sheriff of Cook county hold whatever sum of money is collected on the judgment and execution issued in this cause until the 2d day of January, A. D. 1899, or until the further order of this court, in order to allow the said defendant, Franz J. Weber, to file a bill in equity to determine his interest, if any, in the money so collected, and to apply for an injunction or such other relief as he may be entitled to in the premises, to which said action of the court in the premises the said plaintiff, by his counsel, then and there duly excepted."

It thus appears that the trial court held that replevin would not lie at the instance of said Weber to recover said property from the sheriff, and that the court sought to so rest the case by staying the payment of the money in the hands of the sheriff that appellant Weber could have the opportunity to proceed in a court of chancery to determine his interest, if any, in the property sold, or the proceeds thereof. That may have been done, so far as appears from this record.

Under the practice and statutes in this State, when a replevin suit is dismissed or the plaintiff therein takes or suffers a non-suit, he may show, in defense of a suit upon the replevin bond, such facts as would establish his right to maintain the suit in replevin. But if it appear in a suit upon such bond that the replevin suit could not have been successfully prosecuted, then the *prima facie* right to recover upon said bond is established. As above shown, appellant Weber could not have maintained his said suit in replevin. There being no other defense made to the suit upon said replevin bond it follows that appellee should recover.

The judgment of the Circuit Court is affirmed.

**William McCoy v. The World's Columbian Exposition.**

1. **PRACTICE**—*Adding the Similiter*.—It is not error to proceed to trial without a *similiter*.

2. **CORPORATIONS**—*Can Not Become Stockholders*.—In this State a corporation can not become a stockholder in another corporation unless power to do so is specifically granted in its charter or necessarily implied from it.

3. **SAME**—*As Stockholder—Who Can Raise the Question—Ultra Vires*.—A corporation when sued on its subscriptions to the capital stock of another corporation may itself raise the defense of *ultra vires* provided it is not estopped from so doing, but it can not be done by another person when sued upon his own subscription.

4. **SAME**—*Prima Facie Evidence that the Stock is Fully Subscribed*.—The articles of incorporation certified by the Secretary of State afford *prima facie* evidence that the company's stock was fully subscribed.

5. **INTEREST**—*On Unpaid Subscriptions to Stock*.—Interest at legal rates is properly allowed on an unpaid subscription, in writing, to the capital stock of a corporation after it becomes due.

**Assumpsit**, to recover a subscription to the capital stock of a corporation. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 27, 1900.

JOSEPH WRIGHT, attorney for appellant.

MATZ, FISHER & BOYDEN, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action in *assumpsit* to recover a subscription to the capital stock of the appellee corporation. That appellant signed a subscription list agreeing to take one thousand shares at \$10 each, and that at the same time \$200—being two per cent of the amount subscribed—was paid in, is not controverted. Three calls, each for twenty per cent of the subscription, were subsequently made, which appellant failed or refused to pay. It is now sought to recover \$5,800, being the sixty per cent thus called for, less the \$200 originally paid.

It is stated that appellant's subscription was obtained

upon representations that the fair would be located on the lake front, where he would have been directly benefited, and that his refusal to pay was because it was not so located. But no reliance is now placed upon this as ground for defense.

At the conclusion of the evidence the Circuit Court, upon motion of appellee's counsel, directed a verdict against appellant for the amount claimed, with interest.

When the case was called for trial no replications to appellant's special pleas were on file. His counsel objected to going to trial and moved for judgment on his said pleas. Counsel for appellee stated, however, that the replications would immediately be filed, and this was done before the jury were sworn to try the issues, leave being given by the court to file the same *nunc pro tunc* as of the time the case was called. It appears, therefore, that appellee was not compelled to proceed to trial without the issues being formed. Replications were actually filed, and it is not error to proceed to trial without a similiter. *Gillespie v. Smith*, 29 Ill. 473. It does not appear that appellee was in any way injured by the order complained of.

Appellant's principal points of contention are, first, that he is not liable on his subscription because, as it is claimed, the entire capital stock of the appellee had not been fully subscribed prior to making the said calls; second, that certain of the subscriptions to such stock were made by corporations and were *ultra vires* and void, and that therefore to the extent of such subscriptions the capital stock remained unsubscribed; and third, that appellee was in no event entitled to recover interest.

It is urged that appellee has no corporate existence until its entire capital stock was fully subscribed, and that this was never legally done; that until this was done no call or assessment could be made upon the stockholders. The evidence tends to show, however, that the said stock purports to have been fully subscribed upon the books of subscription opened pursuant to a license regularly issued by the Secretary of State, and that a certificate of incorporation

was duly issued. The statutory formalities appear to have been fully complied with. The point of objection, however, is that certain of these alleged subscriptions to the capital stock were made by corporations having no legal power or authority so to do; that these were invalid, not binding upon the parties who made them; and that therefore as to so much of the capital stock, it was never subscribed. Hence, it is said the corporation was never regularly and legally incorporated.

If it be conceded, which, however, appellee does not concede, that the evidence satisfactorily tends to prove that some of the stock in question was subscribed by corporations whose power so to do was open to question, there is no evidence tending to show that such subscriptions were repudiated, that they have not been fully paid, or that appellant has been in any respect injured. It is no doubt the law in this State, that a corporation can not become a stockholder in another corporation, unless power so to do is specifically granted in its charter, or necessarily implied from it. *People v. Chicago Gas Trust Co.*, 130 Ill. 268. It is quite possible—assuming what the evidence fails to establish, that certain of the stock was subscribed for by corporations whose charters did not authorize them to acquire such stock—that such a corporation might itself raise the defense of *ultra vires*, if sued upon its subscription, provided it was not estopped from so doing. But that issue is not presented here, and it is no defense to a subscriber sued on his own contract, that there is a possibility that some other subscriber may have a valid defense to an attempt to enforce payment of a similar subscription. It can not be said as a matter of law in this collateral proceeding, that a subscription to the capital stock of appellee by another corporation, if made, was necessarily *ultra vires* and void. Such power may have existed by the latter's charter specifically, or by necessary implication. The cases cited by appellant's counsel as holding corporation subscriptions unauthorized and void, are for the most part those in which the question of power was directly at issue.

This is not the case here. Appellant had power to make his own subscription, and it is that he is seeking to avoid. In *Vinegar Co. v. Faehrenbach*, 148 N. Y. 58, it is said:

"The argument that it appears that the capital stock was subscribed for in part by corporations, and that such subscriptions were invalid under the law, is of no avail. That is a question for the people to raise through their proper officers and in appropriate proceedings. The defendants can not raise it."

The articles of incorporation certified by the Secretary of State afford *prima facie* evidence that the appellee's stock was fully subscribed. *Jewell v. Rock River Paper Co.*, 101 Ill. 57. This is not overcome by anything in the record to which our attention has been called.

The trial court allowed interest on the amount of the unpaid subscription. In *Munger v. Jacobson*, 99 Ill. 349, it was held that interest is not recoverable in an action against a stockholder to enforce a statutory liability to creditors of the corporation for double the amount of his stock. That case is supposed by appellant's counsel to be decisive against the judgment here, so far as it includes interest. We do not, however, regard it as applicable. The statute provides for allowance of interest "for all moneys after they become due," on an "instrument of writing." The subscription in writing in the case before us, signed by appellant, provides that the terms of payment shall be "two per cent down, balance as called for by the corporation." The subscription is, in effect, a promise in writing to pay for the stock subscribed, upon those terms. The money became due when called for, and the allowance of interest was not error. *Rikhoff v. Brown's Rotary S. S. K. Co.*, 68 Ind. 388; *Gould v. Town of Oneonta*, 71 N. Y. 298; *Cook on Stock & Stockholders*, Sec. 112.

Other propositions are presented by counsel, which we have carefully considered; but we do not deem it necessary to extend this opinion in order to discuss them at length.

The judgment of the Circuit Court must be affirmed.



**Frank H. Follansbee et al. v. The Northwestern Mutual Life Ins. Co.**

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1. **SOLICITOR'S FEES**—*In Foreclosure Suits*.—Where the mortgage provided that in case of foreclosure the mortgagors should pay an adequate and reasonable sum as solicitors' fees, "the amount thereof to be fixed by the court," and the decree, exclusive of solicitors' fees, is \$40,110.24, a solicitor's fee of \$1,200 is sustained.

2. **SAME**—*A Question of Fact*.—What is a reasonable and proper amount to be allowed as solicitors' fees in a given case, is a question of fact to be determined from the weight of evidence.

3. **SAME**—*Not to be Controlled by Percentage Alone*.—The amount to be allowed in foreclosure suits as solicitors' fees is not controlled by percentage alone, nor simply by the amount involved, nor by the locality, but by all the facts and circumstances in the case.

**Foreclosure**.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 27, 1900.

PARTRIDGE & PARTRIDGE, attorneys for appellants.

HOYNE, O'CONNOR & HOYNE, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is a proceeding by bill in chancery to foreclose a real estate mortgage. The only question presented in the brief and argument by counsel for appellants relates to the amount allowed to appellee as fees for its solicitors for their services in this case. Other questions are embraced in the assignment of errors but they must now be considered as waived.

The principal sum secured by said mortgage is \$35,000. The amount found by the decree to be due from appellant Frank H. Follansbee to appellee, exclusive of solicitors' fees, is \$40,110.24. The Circuit Court overruled exceptions to, and confirmed the master's report allowing \$1,200 as such fees. That is a trifle less than three per cent upon

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the amount found by the decree to be due as aforesaid, and a little less than three and one-half per cent upon the amount of the principal sum secured by said mortgage. The mortgage provided that in case of foreclosure the mortgagors would pay an adequate and reasonable sum as solicitors' fee, the amount thereof to be fixed by the court.

On behalf of appellee two witnesses were examined as to such fees. One of them was one of the solicitors for appellee, who testified that the usual and customary fee in Chicago for such services as were rendered by the solicitors for appellee in this case, is five per cent on the amount found due, and that there should be allowed to appellee in this case \$1,200 for its solicitors' fees. The other one of appellee's witnesses, one of the leading and most experienced members of the Chicago bar, testified that the usual and customary charge in Chicago is from three per cent to five per cent, and that \$1,200 to \$1,500 would be a fair and adequate fee in this case.

On behalf of appellants, one of their solicitors testified fixing \$350 to \$500 as an adequate and fair fee in this case.

Those named are all the witnesses examined upon the question of fees. The testimony clearly sustains the master's report and the decree of the court. To have fixed any smaller sum would have been to wholly ignore the testimony and to have fixed a sum arbitrarily. Neither the master nor the trial judge would be justified in so doing where the evidence was so conclusive and of such a character as that presented in this case.

Counsel for appellants cite *Heffron v. Gage*, 149 Ill. 182. In that case the mortgage provided for the payment of the specified sum of \$1,000 as a solicitor's fee. That amount was allowed by the decree and it was held that was not error. They also cite *Telford v. Garrels*, 132 Ill. 550. In that case, as stated in the opinion, "the evidence shows that the amount allowed is a reasonable fee for the services rendered."

No other cases are cited by counsel for appellants except two in *Pennsylvania State Reports*. But cases in other States can not control or be considered of any special weight as to

what are reasonable or customary solicitors' fees in Chicago. Facts and circumstances enter into the problem in one locality which may not in another. For instance, it costs vastly more to meet necessary expenses in some places than it does in others.

What is a reasonable and proper amount to be allowed as solicitors' fees in a given case is a question of fact to be determined from the weight of evidence. *Casler v. Byers*, 129 Ill. 657, 670.

In *Guignon v. Union Trust Co.*, 156 Ill. 135, a solicitor's fee of \$2,250 was approved; the amount of the mortgage foreclosed was \$43,000—over five per cent.

In *Casler v. Byers*, 129 Ill. 670, *ante*, the mortgage was for \$3,350, and the fee allowed was \$500, that is, fifteen per cent.

The amount that should be allowed as fees is not controlled by percentage alone, or simply by the amount involved, or by the locality, but by all the facts and circumstances. It may be presumed that witnesses who testified as to the value of such services took all these things into account.

It is proper to take into consideration the amount involved. *Town of Bruce v. Dickey*, 116 Ill. 527, 542; *Guignon v. Union Trust Co.*, *ante*; *Clark v. Ellsworth*, 73 N. W. Rep. 1023, 1025 (Iowa); *Eggleston v. Boardman*, 37 Mich. 14; *Smith v. C. & N. W. Ry. Co.*, 60 Iowa, 515.

The court below is in a better position to determine the value of the services rendered than is this court. *Farmers' Loan & Tr. Co. v. McClure*, 78 Fed. Rep. 209 (U. S. Cir. Ct. of App., 8th Cir.).

The decree of the Circuit Court is affirmed.

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### City of Chicago v. Chicago & N. W. Ry. Co.

1. PLEADING AND PROOF—*Recovery of Money Paid Out as Consequential Damages.*—To recover money paid out by a city in satisfaction of judgments for damages caused by the construction of a viaduct over the tracks of a railroad company at the intersection of streets, the city

must allege and prove facts by virtue of which it may appear as a matter of law that the damages were in some way directly or indirectly inflicted by reason of the railroad's conduct, and this evidently must require special allegations from which the court may, on demurrer, if need be, determine as a matter of law from the facts alleged, whether any such legal obligation exists.

2. PLEADING—*Where the Common Counts Will Not Suffice.*—The common count is not a sufficient declaration for the recovery of money paid by a city in satisfaction of judgments recovered against it for damages caused by the construction of a viaduct over the tracks of a railroad at the intersection of streets. There must be specific averments to warrant the admission of evidence of the character required and for the purpose under consideration.

3. SAME—*Where the Common Counts Are Not Sufficient.*—Where it is sought to recover under an implied assumpsit, based upon the non-performance of an alleged legal duty, the gist of the controversy is not a contract from which might arise an implied promise, but the existence of the duty.

**Assumpsit.**—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Mr. Justice SHEPARD dissenting. Opinion filed February 27, 1900.

**Statement.**—This is an action by the city of Chicago to recover money which it has paid in satisfaction of judgments for damages caused by the construction of a viaduct over the tracks of appellee at the intersection of Chicago avenue and Halsted street. These judgments were recovered in the years 1885, 1886 and 1887, and were paid by the city in 1888 and 1889.

The present action was brought June 5, 1893, more than five years after the dates at which said judgments were rendered, but within five years from the dates when they were respectively paid. The damages were originally laid at ten thousand dollars. A declaration containing only the common counts in assumpsit, with no bill of particulars, was filed July 28, 1893. Appellee pleaded the general issue. The *ad damnum* was subsequently, March 19, 1894, increased to \$75,000. More than three years thereafter, November 15, 1897, the city, with leave of court, filed an additional special count, to which appellee pleaded the five years limitation of the statute, alleging that the matter of the special count

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City of Chicago v. C. & N. W. Ry. Co.

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was other and different from that of the declaration as originally filed. A demurrer by the city to this plea was overruled, and the cause came on for trial upon the original declaration, containing only the common counts and the plea of general issue thereto.

Upon the trial the city sought to introduce evidence tending to show that the building of the viaduct had become necessary in order to preserve to the public the use of streets which were main thoroughfares, and which by the construction and operation of appellee's railway tracks, constantly increasing in number and substantially occupying the entire intersection of the street at that point, were so blocked and obstructed as to impede and practically destroy public traffic thereon; also evidence tending to show that the damages caused by the construction of said viaduct, to the property of the several parties who had recovered said judgments, were equal to the amounts so recovered; and that the cost of the viaduct was paid by the city, appellee contributing a large part thereof. Objections were made to the introduction of this evidence, and of any evidence to the effect that the building of the viaduct had been made necessary in order to preserve the public use of the streets because of the obstruction thereto caused by the defendant's use thereof. The court sustained these objections, ruling that such evidence was not admissible under the common counts. Thereupon, on motion of appellee's counsel, the jury were instructed to find a verdict for the defendant, which was done. Judgment having been rendered accordingly, this appeal was taken.

C. M. WALKER, C. S. THORNTON and S. A. LYNDE, attorneys for appellant.

E. E. OSBORN, attorney for appellee; A. W. PULVER and LLOYD W. BOWERS, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It was contended by counsel for appellee, at the trial, that the evidence sought to be introduced was inadmissible

and immaterial under the common counts. This was, it is said, the only point decided—the only ground upon which objections to the evidence were sustained.

There was no controversy as to the recovery and amount of the judgments obtained against the city, and the right of the latter to recover the same from appellee in a proper proceeding does not appear to have been directly considered. It is, perhaps, indirectly involved to this extent, that if the city could not recover at all, the condition of the pleadings would be immaterial. Appellant claims it is entitled to recover because “it was the default or failure of the railway company to perform its legal duty, and ‘restore’ these streets to proper condition for public use, that compelled the city of Chicago to build this viaduct; and the land damages being a necessary consequence and result of the construction of the viaduct, the city, in building it, was merely doing what the law required the railroad company to do, and the money paid by it on these land damages was paid by the city for the use, in fact, of the railroad company.”

We are told by counsel for appellant that the sole question is whether, if there was a legal obligation on the part of appellee to build this viaduct, and to pay such land damages as necessarily resulted, the law implies from such obligation a promise to the city to repay thereto the money appellant has been forced to pay out in satisfaction of the judgments against it. It is urged that appellant was entitled to prove the existence of this legal obligation under the common counts, and that the court erred in excluding the evidence offered for that purpose.

It is evident that the existence of a legal obligation on the part of appellee is the matter in dispute. The question is not whether there is any contract debt. It is conceded there is not. The case is not one where there is an agreement completely executed by the one party upon which nothing remains for the other party to do except to pay money. The city is not suing for the cost of erecting the viaduct, which it claims it was the duty of appellee to erect, and for which cost, granting the duty, it might per-

haps with show of reason be claimed an implied assumpsit would arise. The evidence sought to be introduced shows that appellee paid its contribution to that expense, presumably its full share, apparently performing the alleged duty to that extent.

The contention is that appellant has been made to pay out money for consequential damages, which it has become the duty of appellee to refund, because of its failure to perform another alleged duty which appellant's evidence shows it did contribute toward doing. The point of the controversy is whether there is any such duty; whether appellant did pay damages which appellee ought to refund; whether the former paid for appellee's tort or its own merely. To establish the duty, to maintain that it paid damages which appellee ought to have paid, it must set up and prove facts by virtue of which it may appear as a matter of law that the damages were in some way directly or indirectly inflicted by reason of appellee's conduct. This evidently must require special allegations from which the court may, on demurrer if need be, determine as a matter of law from the facts alleged, whether any such legal obligation exists.

The primary responsibility for payment of the damages which it is sought to recover, appears to have rested upon the city, which, itself, erected the viaduct. It does not sue upon any contract of indemnity against damages to property owners.

According to the evidence offered, the suit is to recover for payment of damages directly caused by the city's own acts. The latter claims to have been compelled to inflict these damages for which it has paid, by the conduct of appellee. The very statement of this claim is a statement of a special cause of action. Had the city allowed or compelled appellee to build the viaduct, which it now says was the latter's duty, it may be the appellee could have protected itself from these claims for damages in whole or in part. It does not appear that appellee refused or was requested to do so. It contributed to the cost, but the city did the work. "Where the declaration contains nothing

but the common counts, and there is a general denial, it is incumbent upon the plaintiff to prove a legal and binding contract." *Durant v. Rogers*, 71 Ill. 121 (124). Here appellant sought to prove, not a contract express or implied, but a failure or neglect of what is claimed to have been a duty, to the performance of which it concedes appellee contributed its share.

The common counts will not suffice. There must be specific averments to warrant the admission of evidence of the character and for the purpose under consideration. Authorities bearing upon the admissibility of evidence under the common counts are numerous. We refer only to a few of them. *Zjednoczenie v. Sadecki*, 41 Ill. App. 329; *Robinson v. Holmes*, 82 Ill. App. 307, and cases cited; *Maxwell v. Longnecker*, 89 Ill. 102; *Parmly v. Farrar*, 169 Ill. 607.

It is not every case based upon an express promise wherein recovery can be had under the common counts. Where, as in this case, it is sought to recover upon an implied assumpsit, based upon the non-performance of an alleged legal duty, the gist of the controversy is not a contract from which might arise an implied promise, but the existence of the duty. The defendant is entitled to be informed by the declaration what the facts are which it is claimed create the legal obligation. Appellant could not introduce the evidence under consideration to support a cause of action not shown by its declaration. The evidence offered fails to support an implied promise.

We can not agree with appellant's counsel, that the determination of the question as to the admissibility of the evidence necessarily requires us, as the case now stands, to decide whether there is a legal liability on the part of the railroad company to pay these damages. The question is not presented by the declaration.

Appellant seems to have recognized the inadequacy of the common counts, when it obtained leave and filed the special count, to which the statute of limitations was pleaded. This count stated a new cause of action, and was filed too late. Had it been filed in apt time, another question would have arisen.



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Fred W. Wolf Co. v. Bills.

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We are of opinion that no error was committed in sustaining the objections to the evidence under consideration, and the judgment of the Superior Court will be affirmed.

MR. JUSTICE SHEPARD dissenting.

The theory upon which appellant seeks to recover, is, as I understand it, that the city having performed a duty in restoring the street, which, under the law, it was the duty of appellee to perform, and for such performance having been mulcted in damages which it has paid, it is entitled to maintain this suit as for money paid, laid out and expended, upon the implied promise of appellee to reimburse appellant.

Under such a theory it seems to me that the common counts were a sufficient basis for the admission of evidence showing the facts upon which the implied promise arose.

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Fred W. Wolf Co. v. Isabelle Bills.

1. *INSTRUCTIONS—On Conflicting Evidence.*—Where there is a positive and irreconcilable conflict in the evidence, the instructions to the jury should be strictly correct.

**Assumpsit**, on a contract in writing. Appeal from the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

**Statement.**—By contract between the parties to this suit, appellant agreed to manufacture an ice-making plant and put the same in operation for appellee in New Mexico. The price thereof, and terms of payment agreed upon, are as follows:

“The price for the above machine is eleven thousand seven hundred and ninety-eight dollars (\$11,798).

Payments to be made as follows: \$2,000 on signing this contract, receipt of which is hereby acknowledged.

\$2,000 when machinery is ready to ship.

\$7,798 on acceptance as specified herein, and it is under-

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stood that before the machinery is shipped this last payment shall be deposited in some bank in Chicago subject to our order on acceptance as above, or evidence satisfactory to us shall be given that said last payment will be made when due."

Said contract was made May 22, 1893, and the machine was to be ready for shipment within thirty days thereafter. June 24th, O. P. Bills, husband and agent of appellee, went to the place of business of appellant in Chicago, and met there Frank W. Pilsbry, a representative of appellant. Said O. P. Bills then and there requested that appellant accept as in compliance with, or in lieu of, the provision of said contract as to the payment of the sum of \$7,798, the following guaranty and agreement, viz.:

"COLORADO SPRINGS, COLO., June 15, 1893.

*To the Fred W. Wolf Company, Chicago, Ill.:*

DEAR SIRS: Referring to your agreement with Isabelle Bills, dated Chicago, May 22, 1893, to furnish and erect in Eddy, New Mexico, one ice-making plant, and to the payments therein provided to be made therefor, I do hereby, for value received, guarantee and agree to make payment at this place of the final sum of \$7,798 therein mentioned, as follows:

\$2,000 thereof on completion and acceptance of said plant, as in said agreement provided;

\$2,899 thereof in thirty days after such completion and acceptance thereof; and

\$2,899, remainder thereof, in sixty days after such completion and acceptance thereof, with interest at the rate of seven (7) per cent per annum on said last two amounts, from the time of such completion and acceptance until paid, respectively.

Yours truly,

J. J. HAGERMAN."

The testimony is irreconcilably conflicting as to whether there was an agreement then made as to appellant's accepting such guaranty. By letter addressed to said O. P. Bills, Eddy, New Mexico, dated June 27th, three days after said interview, appellant notified appellee that the material was ready to ship and that a part of it was then loaded upon the cars; that appellant was "simply awaiting the arrangement of the final matters, before letting them go forward,"

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and declining to accept the Hagerman guaranty. June 29th, appellee, at Eddy, sent to appellant a draft for \$2,000, being the second payment upon said contract. Letters at that time were between four and five days in transmission between Chicago and Eddy.

Said machine was never shipped by appellant, and no further payment was ever made upon said contract. This suit was commenced by appellee to recover from appellant the amount which she had paid upon said contract. The verdict and judgment are for the sum thus paid, viz., \$4,000. It is to reverse that judgment that appellant brings the case to this court.

HAMLIN, SCOTT & LORD, attorneys for appellant.

ST. JOHN & MERRIAM, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

Upon the trial of this case in the court below appellee offered in evidence the original contract between the parties to this suit, and then offered in evidence the Hagerman guaranty agreement (appearing in full in the foregoing statement) in connection with testimony tending to show that said guaranty agreement was accepted by said Pilsbry on behalf of appellant as a modification of said original agreement as to the payment of the sum of \$7,798. The only testimony offered by appellee in support of her contention that said guaranty was thus accepted, is that of said O. P. Bills. No person was present at the interview between said Bills and said Pilsbry other than the participants. The *onus* of establishing the alleged change in said original contract was upon appellee. Said Pilsbry testified positively that he did not accept or promise to accept said guaranty.

The testimony of Mr. Bills as to the alleged acceptance by Mr. Pilsbry of said guaranty, taken in full from the record, is as follows, viz.:

“But he, Pilsbry, said, ‘We are not satisfied to have this

payable in Colorado Springs; it should be paid here.' I said that in a deal of this size a little matter of exchange would not make much difference, and I would see that any expense in transferring the money from the Springs to Chicago would be paid, and he said that was satisfactory. That is my recollection of it, as near as may be."

We can not regard this as very satisfactory evidence to support so important and radical a change in the original contract. In considering the testimony of these witnesses to arrive at a correct conclusion, it is necessary to consider the situation and circumstances as they existed at the time. As Mr. Pilsbry testified, there was then "a silver panic on hand." Said guaranty is dated at Colorado Springs, and in it Mr. Hagerman says, "I guarantee and agree to make payment at this place," etc. By said guaranty the last payment under said contract was to be made in three installments at different dates.

Mr. Pilsbry said that it would not be satisfactory to have the money payable at Colorado Springs. Mr. Bills replied that in a deal of that size a little matter of exchange would not make much difference, and that he would pay it. Mr. Bills says Mr. Pilsbry then said, "That is satisfactory." It seems to us clear, in the light of all the conditions and circumstances as they then existed, that that reply by Mr. Pilsbry referred only to the question of the exchange, and did not refer to payments being made in Colorado, or to the last one being made in three different installments.

But certainly, with such a positive and irreconcilable conflict in the statements of these two witnesses, the instructions to the jury should be strictly correct. The court gave the following instruction, viz.:

"The court instructs the jury, as a matter of law, that under the contract offered in evidence the defendant, The Fred W. Wolf Company, was not required to ship to plaintiff, Bills, the machinery in question before the last payment of \$7,798 should have been deposited in some bank in Chicago, subject to the order of The Fred W. Wolf Company, on acceptance of the machine as specified in the contract, or until evidence satisfactory to the defendant, The Fred W. Wolf Company, should be given that such

last payment would be made when due. And the jury are instructed that the Fred W. Wolf Company was the sole judge, under the terms of such contract, as to whether or not the evidence so to be given was or was not satisfactory, *but in exercising such judgment the defendant was to act reasonably, and in determining whether it did act reasonably in the matter you are to consider the evidence and all the facts and circumstances in evidence."*

That instruction, as presented by counsel for appellant, was modified by the court by adding thereto that part printed in italics. Such modification, considered in connection with the facts in this case, was erroneous. There is no testimony that there was any captious or trifling objection on the part of appellant to the proposed change in the contract. Appellee did not offer a substantial compliance with the terms of the contract, to which appellant interposed some frivolous and technical refusal to accept as not being satisfactory. Whether appellant should accept the last payment in installments, deferring the date of maturity, and agree to change the place of payment from Chicago to Colorado Springs, were material and important questions at that time. Not only was there then "a silver panic," as expressed in the testimony, but the fact will be readily recalled that there was also a serious general depression and unrest in financial and business circles. Appellant had a perfect right, under said contract, to say that the changes proposed were not satisfactory. The question of whether such conclusion was reasonable should not have been submitted to the jury to determine. The decision of that question was a right, and in view of the business and financial conditions at that time, a valuable right, specially reserved to appellant by said contract. Even if said instruction, presented by appellant, should be held to be subject to the criticism urged by appellee, that it would be erroneous if given, still it should not have been given as modified.

As this case must be remanded for another trial, it is not considered advisable to express an opinion upon other questions of fact. For the reasons indicated, the judgment of the Circuit Court is reversed and the cause remanded.

**National Bank of Broken Bow, Nebraska, v. Daniel B. Freeman et al.**

1. **SOLICITOR'S FEES**—*Proof of Employment*.—When a party employs a solicitor, it is not necessary that a specific contract of hiring should be shown.

2. **DAMAGES**—*On Dissolution of Injunction, Where the Solicitor Has Not Been Paid*.—A party may obtain an allowance, upon a suggestion of damages, for a reasonable sum for the fees of his solicitor, although not previously paid, if he has become liable to pay the same.

**Suggestion of Damages**, on the dissolution of an injunction. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 27, 1900.

ROGERS & MAHONEY and FREDERICK A. WILLOUGHBY, attorneys for appellant.

ARNOLD HEAP, attorney for appellees.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

Appellant filed a creditor's bill in the Circuit Court and procured the issuance of an injunction thereon. Upon the motion of appellees the injunction was dissolved. Thereupon, by leave of court, appellees filed suggestion of damages for the wrongful issuing of said injunction. Upon a hearing, the court below allowed to appellees as such damages, the sum of \$50, being the amount claimed for solicitor's fees. To reverse the order allowing such damages appellant brings the case to this court.

Two points are here presented by appellant: (1) that the evidence is not sufficient to support the finding, and (2) that the evidence does not show that a solicitor was employed by appellees.

First. The testimony of the five witnesses examined as to the value of the solicitor's services in procuring the dissolution of said injunction—three called by appellees and

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two by appellant—vary in amount from \$25 to \$100. The solicitor for appellees testified that he had charged his clients \$100. The finding by the Circuit Court is supported by the testimony.

Second. Had appellees employed a solicitor? It is not necessary that a specific contract of hiring should be shown. When a party has not paid his solicitor he may obtain an allowance, upon a suggestion of damages, as in the case at bar, for a reasonable sum for the fees of such solicitor, although not previously paid, if the party has become liable to pay the same. The transcript shows that the appearance of appellees was entered by Arnold Heap as their solicitor; that a demurrer to the bill and afterward an answer thereto by appellees were filed by said solicitor; that there are five different notices to the solicitors for appellant signed by said Heap, as solicitor for appellees; and the record entry of the order appealed from states that appellees approved by their said solicitor. Although appellees can not recover upon said suggestion of damages for the services of their solicitor in all of the proceedings referred to, yet the appearance of their solicitor in those proceedings may be considered in determining whether he was in fact their solicitor in said cause, and whether they are liable for his services. These facts, together with the testimony of said Heap that he had charged appellees \$100 for his services in procuring the dissolution of said injunction, are *prima facie* sufficient to show the employment of and liability to said solicitor by appellees.

We perceive no error which would justify a reversal of said order. The judgment of the Circuit Court is affirmed.

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**Annie E. Hotchkiss v. Frank E. Makeel, Receiver, etc.**

87	323
s190s	311

1. **LIENS—Priorities—Receiver's Charges and Prior Mortgage Liens.**—The Circuit Court of Cook County sitting in chancery has no power to adjudge that the charges of a receiver are paramount to the lien of a prior mortgage.

2. **SAME—Priorities—Railroads Charged with a Duty to the Public—**

*Exception to the Doctrine.*—Railroads and other business properties charged with a duty to the public superior to private obligations, of which the mortgagee at the time of his investment is charged with knowledge that his security is liable to be displaced in favor of the superior obligation, are exceptions to the rule.

3. *ESTOPPEL—Does Not Apply to a Mortgagee Standing By, etc.*—A mortgagee of private property who stands by and sees the owner or a receiver appointed in a suit to which he is not a party, care for and improve the mortgaged property, can not be said to do so at the peril of having his lien displaced in favor of the cost of such care and improvement.

Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded with directions. Opinion filed February 27, 1900.

FREDERICK ARND, attorney for appellant.

THOMAS E. D. BRADLEY and ROBERT J. FRANK, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The property known as the Alabama Hotel, in Chicago, was in 1895, and for some years prior thereto, subject to a mortgage made by former owners thereof to Edward Hotchkiss, to secure \$16,000. By *mesne* conveyances the title to said property, subject to such mortgage, became vested in one Charles H. Briggs, who traded the property to one Michael J. Dunne. Claiming that he had been defrauded in the trade, Dunne filed his bill in equity in the Circuit Court of Cook County, against Briggs, to obtain a setting aside of the trade and a restoration of the rights of each in the respective exchanged properties. Dunne prevailed in the suit, in both the Circuit and Supreme Courts (see Briggs v. Dunne, 168 Ill. 226), and the hotel property came back to Briggs.

The decree of the Circuit Court ordering a setting aside of the trade and a reconveyance of the properties, was entered July 23, 1896, and on that day the appellee, Makeel, was, by consent of the parties to the suit, appointed receiver of the hotel property, and shortly afterward, he, as such



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receiver, entered into possession thereof; and he remained continuously in possession of the same, either as receiver, or as lessee, until October 25, 1898.

Makeel made his first report as receiver February 5, 1897, and it appearing therefrom that the operating of the hotel was being carried on at a loss under the receivership, and for various other reasons set forth, the court entered an order on March 8, 1897, reciting, among other things, that it was necessary for the conserving of the property that the same should be kept open and running as a hotel, and that the best interests of all parties would be subserved by the execution of a lease of the premises to said Makeel, individually, and it was ordered that such a lease be entered into.

Thereupon, such lease was entered into between Makeel, individually, and Briggs and Dunne, for a specified term, beginning March 8, 1897, and ending May 1, 1898.

Makeel, as receiver, subsequently filed other reports, the first one of which was on February 15, 1898, in which he stated that since March 8, 1897, he had continued to care for the property and conduct the hotel business under a special arrangement, in the nature of a lease, running from March 8, 1897, to May 1, 1898. Other reports followed until September 21, 1898, on which date Makeel, as receiver, petitioned the Circuit Court, setting forth, among other things, the final determination of the Dunne suit; that Briggs, to whom the property had gone back as a result of that suit, had been cut off by a foreclosure of the mortgage to Edward Hotchkiss, and that the purchaser under the foreclosure sale would be entitled to a master's deed of the property about October 1st next ensuing; that there was a balance due him, as receiver; that there were no funds in the hands of the receiver out of which the amounts found due and allowed to him by previous orders might be paid, and that Briggs was insolvent, and asking for a decree declaring such sums to be a valid and paramount lien on the premises, and that unless the same should be paid, etc., the property be sold to satisfy the same.

Following that petition, and on October 1, 1898, the court upon the application of the receiver granted an injunction restraining the appellant and her solicitors and agents from taking possession of the property, or in any way disturbing or molesting the possession of the receiver, Makeel, until the further order of the court.

And on January 28, 1899, the decree appealed from and now under review, was entered by the Circuit Court, making findings at great length and allowing to the appellee a balance of \$1,917.42, and declaring said amount to be a paramount charge and lien upon the property, and ordering a sale if it be not paid, etc.

While the recited proceedings were being had in the Dunne suit, in the Circuit Court, and on January 19, 1897, Edward Hotchkiss filed his bill in the Superior Court of Cook County, to foreclose the \$16,000 mortgage held by him, and that cause went to a decree of foreclosure and sale, and, on June 29, 1897, the property was sold thereunder, by a master in chancery, to Edward Hotchkiss.

He died subsequently, and the master's certificate of sale was assigned by the administrator of his estate, to the appellant, and afterward, on September 30, 1898, a master's deed was issued to appellant.

It was by virtue of such foreclosure decree and master's deed that appellant became interested in the property.

She had never, up to that time, been a party to the Dunne suit, nor had Edward Hotchkiss been a party thereto, except that at one time he intervened therein for a limited special purpose connected with the furniture of the hotel, and such matter becoming adjusted, he was dismissed out of the case within a comparatively few days after he first intervened. The receiver was not made a party to the foreclosure bill, but after the lease had been made to Makeel as an individual, the bill was amended and he made a party defendant, and, on May 17, 1897, he filed his answer in that suit. His answer being important in connection with the estoppel claimed against him, the whole of it, as shown by the abstract, is as follows:

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“ Answer of Frank E. Makeel to the bill of complaint of Edward Hotchkiss, in the Superior Court of Cook County, Gen. No. 180,124. Defendant says that he is now in possession of the premises described in said bill of complaint, under a lease from Charles H. Briggs and Michael J. Dunne, two of the defendants to said bill, to this defendant, approved by said complainant, Edward Hotchkiss, and by Maurice A. Mead, one of the defendants to said bill, which said lease is, however, subject to trust deed being foreclosed herein, as well as subject to the trust deed to Rufus C. Frost, described in said bill of complaint, and is subject to other clauses of defeasance described in said lease and in said consents attached to said lease, and the possession of this defendant and the rights of this defendant are entirely subject to said two trust deeds, and to the orders and decrees of this court in the above entitled proceeding. This defendant, further answering, neither admits nor denies the remaining allegations, statements or charges contained in said bill of complaint, nor any part thereof, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.”

Adverting again to the Dunne suit, the appellant, having received the master's deed on September 30, 1898, and having been enjoined by the order of October 1, 1898, from disturbing Makeel's possession of the property, entered her limited appearance in said suit for the sole purpose of answering and contesting the petition of the receiver filed September 21, 1898, and on October 8, 1898, she filed her special answer to such petition. This was the first time appellant had ever been a party to the suit for any purpose whatever.

It was upon a hearing of such petition by the receiver and her said answer, with additional evidence, that the decree appealed from was entered.

It should, probably, be added, that Edward Hotchkiss, though not a party to the Dunne suit, by an agreement between himself and Makeel attached to the lease from Dunne and Briggs to Makeel, consented to that lease being made. As we read that agreement it amounts, as against Hotchkiss, to no more than a waiving by Hotchkiss of his rights to have a receiver appointed under his bill to fore-

close, and a consent by him to the lease, in consideration that Makeel should pay \$600 for taxes and insurance premiums, on the hotel; and, as against Makeel, that he would pay said sum for taxes and insurance, and would surrender possession of the property to whoever should be entitled to a master's deed thereof under a sale to be had in said foreclosure suit, "immediately upon such person becoming entitled to such master's deed; it being understood that said Makeel's possession is entirely subject to the rights of the purchaser" at said master's sale. (Quotation from the agreement.)

Such agreement was entered into, seemingly, to insure a certain and continuous operation of the hotel for the term of the lease, and enable the accommodation of boarders to be relatively permanent, it being a boarding rather than a transient hostelry.

The first and most important question arising upon the record, is as to the power of the Circuit Court, sitting in chancery, to adjudge the charges of the receiver to constitute a paramount lien over the lien or title of the prior mortgagee.

The power to subordinate the lien of a mortgage to the charges of a receiver, has been frequently exercised by equity courts in recent years, in the cases of mortgages of railroads, and other properties impressed with a public duty, and in one case (*Beckwith v. Carroll*, 56 Ala. 12, and probably in other analogous cases), where growing crops were involved, the receiver was considered to have created the very property over which the receivership extended.

But, wherever exercised, it has been because of the peculiar character of the property. A mortgage is a contract obligation, and is as sacred as any other contract; and anything that destroys or impairs its lien destroys or impairs a contract.

The reason that supports the excepted cases of railroads and some other business properties is, that they being charged with a duty to the public that is superior to any private obligation, the mortgage owner has knowledge

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when he invests that his security is liable to be displaced in favor of that first obligation. In no well-considered case that we know of has the power been exercised to the subversion of the rights of a prior mortgagee of purely private property, unless for very peculiar reasons.

But it is contended in this case, that the mortgagee stood by, encouraged, and saw his security protected and perhaps enhanced by the receiver. There is no evidence that the mortgagee did anything except of a permissive character, and it would be a hazardous equitable doctrine to hold that a mortgagee of private property who stands by and sees the owners thereof or a receiver appointed in a suit to which he is not a party, between contending and rival owners, subject to his mortgage, care for and improve the security, does so at the peril of having his lien displaced in favor of the cost of such care and improvement. We can not assent to such a doctrine.

It was, in our opinion under the facts in this record, an unwarranted exercise of the equity powers of the Circuit Court to give to the receiver priority of lien for his charges over the mortgage of appellant. The fundamental principles of equity jurisprudence forbid it.

There are other questions presented by the record and especially that of estoppel, which, under the facts before us, would have to be decided adversely to the appellee, but we will not take time to treat of them.

The title to the property having passed to appellant, and there being no *corpus* left for the receiver's charges to attach to, and Briggs being concededly insolvent, the decree will be reversed and the cause remanded, with directions to the Circuit Court to dismiss the petition of the receiver, filed September 21, 1898, for want of equity. Reversed and remanded with directions.

87	630
98	248

**Royal Trust Co., Receiver of the Loan and Investment Co., v. Andrew Culver and Elizabeth Culver.**

1. **BUILDING AND LOAN ASSOCIATIONS**—*Officers are Agents of the Stockholders.*—A stockholder in a building and loan association in this State is a member, and constituent part, of the association, and the officers of the association are his agents as well as the agents of the other stockholders.

2. **SAME**—*Contracts Between Officers and Members.*—A contract between the officers of a building and loan association and one of its members which gives to such member an advantage or preference over other members can not be enforced in a court of equity.

3. **SAME**—*Agreements to Mature Stock, etc.*—An agreement on the part of the association with a member to mature his stock at the end of a stated period is not to be enforced or construed in such manner as to give a preference over the other members of the association. Such member is not entitled to any greater dividends, or larger per cent of the profits, than a non-borrowing member, nor is he entitled to any special advantage over other members from the fact that he is indebted to the company.

**Foreclosure**—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed February 27, 1900.

**Statement.**—In this case a bill of complaint was filed by appellant to foreclose a trust deed given to secure the payment of certain moneys to the National Loan & Investment Company. To said bill of complaint as amended a general demurrer was filed by appellee, which was sustained, and said bill dismissed for want of equity. To reverse the order dismissing said bill, appellant brings the case to this court.

Said Investment Company is what is known as a building and loan association, organized under the statute of this State. The appellee Andrew Culver was a member of said company and held ten (10) shares of its stock. As such a member he procured a loan from said company for the sum of \$1,000. The certificate for said shares of stock, being of \$100 each, provides :

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"In consideration of the membership fee, together with the agreements and statements contained in the application for membership in the company, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, the said National Loan and Investment Company agrees to pay to said shareholder, his heirs, executors, administrators or assigns, the sum of \$100 for each of said shares at the end of six and one-half years from the date hereof."

Said certificate also contains the following, among other provisions, viz.:

"This certificate of shares is issued and accepted by the holder upon the following express conditions and terms:

"I. The shareholder agrees to pay seventy-five cents per month on each share, such payment to be made on or before the last Saturday of each month during the continuance of the contract."

"VII. At the end of each year the profits arising from interest, premiums, fines and other sources shall be apportioned among the shareholders in good standing, and whenever the monthly payments made on any share, together with the profits apportioned to said share, amount to \$100, such share shall be deemed to have matured and no more installments or monthly payments shall be required."

To secure the payment to said company of the amount due and to become due to it as provided by said certificate and by reason of said loan, appellee Andrew Culver assigned said certificate to said company, and appellees executed and delivered seventy-eight promissory notes and a trust deed conveying certain real estate. Each one of said notes is for the sum of \$15.84, one payable each month for the period of six and one-half years. Each of said notes includes the monthly payment of seventy-five cents for each share of stock evidenced by said certificate, amounting to \$7.50, and \$8.34, being one-twelfth of the amount of the annual interest and premium upon said loan. The total amount of said notes is \$1,235.52, and they bear no interest until after maturity.

Said trust deed conveys certain real estate and states that the appellees are justly indebted to said company in the sum

of \$1,235.52, the same being as it is therein recited, "principal, interest and premium of a loan from said company, and said loan was made pursuant to and is accepted under the provisions and by-laws of the said National Loan and Investment Company, a copy of which said by-laws has been received by the grantors, and which said by-laws have been read by the grantors, and are hereby made a part of this contract, which said loan is evidenced and secured to be paid by" said seventy-eight notes. The amount named in each and all of said notes has been paid in full.

PAM, DONNELLY & GLENNON, attorneys for appellant.

W. J. LAVERY, attorney for appellees.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

The certificate of stock and the conditions in it recited, and the assignment of said certificate, the by-laws of said company, said promissory notes and said trust deed, must all be considered and construed together, the same as though all contained in one instrument, and they must all be interpreted under and in connection with the statute relating to building and loan associations under and in pursuance of which said company was organized.

The controversy in this case arises mainly from the fact that the company agreed to mature the stock as full paid at the end of six and one-half years. If the profits accruing to said company had been sufficient to make said stock full paid at the expiration of that period, it having been assigned to the company as collateral security, the cancellation thereof with the payment of said notes would have paid the loan in full, together with interest and premium upon said loan and all dues upon said stock. But the profits were not sufficient to pay in full the amount due upon said stock. We are not, however, advised as to what the amount of dividends was to the credit of said stock at the end of said six and one-half years.



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A stockholder in a building and loan association in this State is a member, a constituent part, of the association, and the officers thereof are his agents as well as the agents of the other shareholders. In some respects the principles governing the relative rights and duties of partners to each other is applicable to such shareholders. Any contract between the officers of such an association and one of the members, which gives to such member an advantage or preference over other members, can not be enforced in a court of equity. The advancing of money by said company to appellee Andrew Culver was not a loan in the sense in which that word is ordinarily understood. It is, more properly speaking, an advance upon the shares of stock of such appellee. The agreement to mature his stock at the end of six and one-half years should not be enforced or construed in such manner as to give to him a preference over other members of said association. He is not entitled to any greater dividends—any larger per cent of the profits—than any non-borrowing member would receive. He is not entitled to any special advantage over other members from the fact that he is indebted to the company.

By the terms of the loan in question there should be paid to the association five per cent per annum premium, five per cent per annum interest and seventy-five cents per month on each share of stock. These payments computed for the term of six and one-half years and added to the principal sum of \$1,000 would amount to \$2,235 at the end of the term. If computed with monthly rests, as would be the result, in effect, if premium, interest and dues were paid monthly as contemplated, the amount would be double the amount of said notes given by appellees.

Said statute provides in substance that dues shall be paid until the shares shall have reached maturity value. The same, in effect, is provided in the conditions forming a part of the certificate issued to appellee. In *King v. International Building Union*, 170 Ill. 135, 140, it is said :

“ All contracts and agreements of such corporations to the effect that the payment of periodical installments for a

fixed period shall be accepted as payment in full of subscriptions to its stock are inconsistent with the statute under which the corporation has its existence, and antagonistic to the legal purposes and plans of such organization, and not enforceable as contracts merely."

It is also there held that by-laws providing for maturing stock in a fixed period without regard to the earnings of the company, are not to be enforced.

The case of *Sullivan v. Spaniol*, 78 Ill. App. 125, is, in all material respects, the same as the case at bar. It is there held that the receiver was entitled to a foreclosure, the objections by the defense being substantially the same as those here urged in support of the demurrer. The reasoning and conclusion in that case command our approval.

The decree of the Circuit Court dismissing said amended bill of complaint for want of equity is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

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**Phillip L. Raphael v. Elias Hartman, A. Goldsmith and C. Porges.**

1. PRACTICE—*When the Plaintiff is Entitled to Have His Case Submitted to a Jury.*—Where the evidence is sufficient to make a *prima facie* case, the plaintiff is entitled to have his case submitted to a jury unless, as in this instance, the contract was void for want of mutuality, or comes within the statute of frauds.

2. SAME—*Where Only One of Several Copartners Are Served with Process.*—The court is inclined to the opinion that Sec. 9, Chap. 110, of the Practice Act, Rev. Stat. of 1897, allows a plaintiff to proceed to judgment where one of several copartner defendants in a case, is served with process, and the others reside beyond the jurisdiction of the court.

3. CONTRACTS—*When Mutual—Construction.*—A contract is mutual when it is an undertaking by a person on the one part to devote his time, energy and attention for a specified period to the sale of the goods of his employers, and in consideration of that undertaking they, on their part, agree to pay him his salary and traveling expenses, and none the less so, because it is not signed by the salesman if he accepts it and works under it until discharged.

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4. *SAME—When Not Within the Statute of Frauds.*—A contract in writing between a firm of merchants and a salesman, signed by the firm but not by the salesman, is nevertheless sufficiently signed by the party to be charged to save it from the effect of the statute of frauds.

5. *SAME—Made in New York.*—A contract made in New York for the payment of money must be construed according to the laws of New York, and it will be presumed in the absence of a showing to the contrary that it was lawful where made.

6. *EVIDENCE—Where One Party Offers Part of a Letter the Other is Entitled to the Whole.*—Where one party to a suit offers in evidence part of a letter written by the defendant to him, if the defendant desires the whole letter in evidence, it is his right when he comes to his defense, but he can not compel the plaintiff to offer as his evidence the whole of the letter in order for him to have the benefit of any admission which it contained.

**Assumpsit**, on a contract in writing. Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 26, 1900.

ROSENTHAL, KURZ & HIRSCHL, attorneys for plaintiff in error.

B. M. SHAFFNER, attorney for defendants in error.

MR. JUSTICE WINDES delivered the opinion of the court.

April 10, 1896, at the city of New York, Hartman, Goldsmith & Co., a partnership composed of Elias Hartman, A. Goldsmith and C. Porges, employed plaintiff in error as a traveling agent for the sale of their imported and domestic goods for the cities of the United States, and entered into a contract in writing for that purpose, by which they agreed to employ him "for a period of one year, commencing April 11, 1896," at a salary of \$2,500 per annum, payable every first day of each month, and such necessary traveling expenses as might arise. Said Raphael, by the contract, which was signed only by Hartman, Goldsmith & Co., agreed that he would devote all his time, energy and attention exclusively to the sale of said goods, and at all times guard the interests of his employers to the best of his knowledge and ability.

Raphael received the contract from Hartman, Goldsmith & Co., left New York, came to Chicago and started to work for the firm, and continued to work until about October 15, 1896, when he was discharged, as the evidence tends to show, without any just cause. Thereafter, on March 11, 1897, he brought suit in the Cook County Circuit Court against Hartman, and thereafter amended his declaration by making both Goldsmith and Porges defendants, but service was had only upon Hartman. The defendants reside in the city of New York, where the contract was made. The declaration is composed of a special count on the contract, alleging its breach by the defendants by discharging him without cause, and also the common counts. Hartman pleaded the general issue, and also a special plea, in substance, that plaintiff had obtained the contract by fraudulent representations, setting out the same, on which issue was joined.

At the close of plaintiff's evidence, the trial being before the court and a jury, a verdict was directed for the defendant by the court, for the reason that the contract was not signed by the plaintiff, and that it came within the statute of frauds, it not being a contract to be performed within one year.

The evidence was sufficient to make a *prima facie* case for the plaintiff, and entitling him to have it submitted to a jury, unless it could be said that the contract was void for want of mutuality, or because it came within the statute of frauds.

The contract is, in our opinion, mutual, because it is an undertaking by Raphael on the one part to devote his time, energy and attention for the period specified to the sale of the goods of his employers, and in consideration of that undertaking they, on their part, agree to pay him his salary and traveling expenses. The contract is none the less mutual because it is not signed by Raphael, for the reason that he accepted it, and worked under it until he was discharged. *Sellers v. Greer*, 172 Ill. 549; *Vogel v. Pekoc*, 157 Ill. 339; *Morris v. Taliaferro*, 75 Ill. App. 182, and cases there cited; *Brown on the Statute of Frauds*, Sec. 345 A.

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Raphael v. Hartman.

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The contract being in writing, and signed by Hartman, Goldsmith & Co., and having been accepted by Raphael and acted upon by him, was clearly not within the statute of frauds. It was signed by the party to be charged. Rev. Stat. 1897, Chap. 59, Sec. 1; *Farwell v. Lowther*, 18 Ill. 255.

The point is made that the defense of the statute of frauds could not be interposed unless it was pleaded, which was not done. This position is not tenable for the reason that when the declaration contains the common counts, as is the case here, it is unnecessary to plead the statute of frauds in order to present it as a defense. *Durrant v. Rogers*, 71 Ill. 121; *Schotte v. Puscheck*, 79 Ill. App. 31; *Wickam v. Bldg. Ass'n*, 80 Ill. App. 523.

But if this contract is within our statute of frauds, that would not avail defendants, because it was made in New York, and being for the payment of money it must be construed according to the laws of New York. It will be presumed, in the absence of a showing to the contrary, that the contract in question was a lawful one in New York, there being no proof before the court of any statute of that State which would render it invalid. *Miller v. Wilson*, 146 Ill. 523, and cases there cited.

Counsel for plaintiff offered in evidence a part of a letter written by the defendants to the plaintiff, tending to show his discharge. Objection was made because the whole of the letter was not offered, and the objection sustained. This, in our opinion, was error. If the defendants desired the whole letter in evidence, that was their right when they came to their defense, but they could not compel the plaintiff to offer as his evidence the whole of the letter in order for him to have the benefit of any admission which it contained. *Imperial Hotel Co. v. Claflin*, 55 Ill. App. 339; *Watson v. Winston*, 43 S. W. Rep. 852; 1 *Jones on Evid.*, Sec. 296; *Greenleaf on Evid.*, Sec. 201, and note; *Heinsen v. Lamb*, 117 Ill. 549-56.

The claim is made on behalf of defendant in error that inasmuch as the defendants Goldsmith and Porges were not served with process and were not before the court, no

judgment could be rendered against him; citing Sandusky v. Sidwell, 173 Ill. 493, and Hyde v. Casey, etc., Co., 82 Ill. App. 83.

We are inclined to the opinion that Sec. 9, Chap. 110 of the Practice Act, Rev. Stat. of 1897, allows plaintiff to proceed to judgment where one of several copartners, defendants in a case, is served with process, and the others reside beyond the jurisdiction of the court. Johnson v. Buell, 26 Ill. 66; Pierson v. Hendrix, 88 Ill. 35; Fender v. Stiles, 31 Ill. 460; Berry v. Krane, 46 Ill. App. 82.

In the Sandusky case, *supra*, it appears that the partners were both living and within the jurisdiction of the court. In the Hyde case the record shows the same situation, though that fact does not appear in the opinion. The Hyde case, as to this point, was decided solely upon the authority of the Sandusky case, and we are inclined to the view that the decision in that case will not be extended by the Supreme Court to cases not falling strictly within the facts which the court then had under consideration. We are informed that a rehearing has been allowed in the Hyde case, and it is still pending in the Supreme Court. This question is unnecessary to be decided, and we do not decide the point for the reason that, for the errors indicated, the judgment must be reversed and the cause remanded, and before another trial the other defendants may be brought before the court. Reversed and remanded.

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### West Chicago St. R. R. Co. v. Leah Liderman.

1. STREET RAILWAYS—*Duty in Using the Streets.*—It is the duty of individuals and corporations, operating cars or other means of conveyance, the use of which experience shows to be a source of danger in city thoroughfares, to be on the lookout themselves and to carefully respect the equal rights of others.

2. CONTRIBUTORY NEGLIGENCE—*A Question of Fact.*—The question of contributory negligence is one of fact for the jury.

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West Chicago St. R. R. Co. v Liderman.

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8. **NEGLIGENCE—A Question of Fact.**—It is a question of fact, in this case, whether a mother was justified in believing that she could rescue her child from an approaching cable car without danger to herself, and if she was justified in so believing, it was not negligence to make the effort.

**Action in Case, for personal injuries.** Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 27, 1900.

VAN VECHTEN VEEDER and BENJ. F. RICHOLSON, attorneys for appellant.

NELSON MONROE, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit by appellee to recover for personal injuries, claimed to have been caused by the negligence of appellant's servants, while appellee was making an effort to rescue her child from a position of danger in front of an approaching cable train.

The mother testifies that she was standing on the sidewalk in conversation with a friend, holding her child, then three years of age, by the hand. Without attracting her attention the child slipped away. When she turned to look for it, she saw it, as she states, about fifteen feet away, running on the track, upon which a cable car was approaching. She ran after the child, and by outcry and gesture endeavored to induce the stopping of the cable train, which she says was then "about half a block, about eighty or ninety feet," distant. She testifies that just as she got her hands upon the child and pushed him to one side, the car struck her, inflicting the injuries complained of.

It is first contended by appellant's counsel that appellee was guilty of contributory negligence, such as to preclude recovery. It is urged that it is no excuse for her conduct in placing herself in the way of the moving car, that she exposed herself to save the life of her child, for the reason that the child's danger was the direct result of her own negligence.

It may well be doubted whether it is negligence *per se* for a mother to let go for a moment of the hand of her three-year-old child, upon a sidewalk within a block of her own home, when she has no notice of any present danger, merely because she is aware of the fact that the street is in part occupied by tracks upon which street cars impelled by cable or electricity are frequently passing. While, as the result showed, the child did run into danger which, if the parent had foreseen, might have been avoided, we should hesitate to say that failure to foresee a danger not at the moment apparent, was negligence as a matter of law. Dangerous as city streets have frequently become under the uses to which they are now put, they are still presumed to be safe, under ordinary conditions, for children as well as adults using ordinary care. In many quarters of a crowded city it is still unfortunately true that children have no other playground and no other opportunity to get sunshine and air except in the streets. It would be a harsh doctrine that would impute to their parents negligence, as a matter of law, for not actively preventing them, through momentary inadvertence, from being there, should they be injured through the negligence of others. It is the duty of individuals and corporations operating cars or other means of conveyance, the use of which experience shows to be a source of danger in city thoroughfares, to be on the lookout themselves, and to carefully respect the equal rights of others. *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274 (279). And parents for their children, as well as individuals for themselves, have a right to presume that this duty will be observed. We can not say in this case that the child's danger was the direct result of the mother's contributory negligence, as a matter of law. The question was one of fact for the jury, and was properly left for their determination. *Slattery v. O'Connell*, 153 Mass. 94; *Creed v. Kendall*, 156 Mass. 291.

Nor do we think the evidence shows negligence which can be imputed as a matter of law to the mother, in her effort to rescue the child from the approaching danger. If the car was then eighty or ninety feet away, it was cer-



tainly a question of fact whether the mother was justified in believing she could rescue the child without danger to herself. If she was justified in so believing, it was not negligence to make the effort. Few mothers would hesitate probably, under such circumstances, if the danger was much more apparent. In the case at bar, the evidence warrants the finding of the jury in this respect. *Eckert v. Long Island R. R. Co.*, 43 N. Y. 503.

There was conflicting evidence as to the negligence of the gripman. The latter states that he put on the brakes as soon as he saw the child leave the sidewalk, and that the car stopped within ten feet. On the other hand, witnesses testify that when the mother screamed and ran after the child, the cable train was about seventy-five to ninety feet away, going at full speed, and that the gripman seemed to pay no heed and made no immediate effort to stop. The question as to appellee's contributory negligence, as well as the question whether appellant's negligence caused the injuries complained of, were questions of fact for the jury. There was evidence to sustain their finding, and we should not be justified in disturbing the verdict.

It is urged that the verdict is excessive. The character and consequences of the appellee's injuries were subjects of controversy at the trial. The jury heard and saw the witnesses. We should have been better satisfied, perhaps, with a smaller sum, but if the jury believed the evidence introduced in appellee's behalf, relating to the injuries she received, it is difficult to find fault with their conclusion. There is no fixed standard by which to measure pecuniary compensation for physical injuries. After careful consideration, we find no reason for holding that the damages awarded are excessive.

The judgment of the Superior Court must be affirmed.

**Michael J. Roughan v. James L. Morris, by his Next Friend.**

1. **COURTS OF CHANCERY**—*Power to Conserve the Estate of a Lunatic.*—It may be regarded as well settled in our State that the power exists in a court of chancery to conserve the estate of a lunatic when such action is necessary.

2. **LUNATICS**—*For What Purpose Suits May be Maintained by a Next Friend.*—A suit may be maintained by a next friend for the purpose of protecting the estate of the lunatic, through a receivership, until a conservator can be appointed to act for him.

3. **PARTIES**—*Bill to Avoid the Deed of an Insane Person.*—The person who brings a bill to avoid the deed of an insane person, must have power to act for such person and bind him and his estate.

**Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding.** Heard in this court at the October term, 1899. Affirmed. Opinion filed February 26, 1900.

**Statement.**—This is an appeal from an interlocutory order appointing a receiver.

The bill of complaint was exhibited by James L. Morris, by Arthur Morris, his brother and next friend. The bill alleges that James L. Morris is an insane person; that he is a widower and had no children, and that Arthur Morris, who appears as his next friend in the suit, and George Morris, his two brothers, are his next of kin. The bill also alleges that the defendant, Michael J. Roughan, procured the signature of James L. Morris to a certain pretended power of attorney, giving the defendant full control and dominion over all the property of said Morris, consisting of a large business and real estate, improved and rented; that for a considerable space of time said Roughan had been in complete and undisturbed possession of said property; that said Roughan had made no report of any of his doings in the premises; that by reason of his mismanagement the business was becoming deeply involved, was likely to be ruined, and the income of Morris destroyed, unless the same was cared for; that the creditors of the complainant

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Roughan v. Morris.

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were refusing to grant any more credit to the business so long as it was under the control of the defendant; that the landlord was about to levy a distress warrant for non-payment of rent, and that if the assets of the complainant were properly applied this would be wholly unnecessary; that defendant had collected and disposed of, to his own use, large sums of money belonging to complainant; that the defendant fails and neglects to pay the debts of the estate, and willfully and maliciously permits the estate to become more and more indebted; that the defendant is insolvent, irresponsible, and not a proper person to conduct said business; that about five weeks must necessarily elapse before the matter of the insanity of Morris can be heard in the Probate Court of Cook County, where a petition has been filed by Arthur Morris and George Morris, brothers and next of kin of complainant, asking for the appointment of a conservator.

The prayer of the bill is *inter alia* for the appointment of a receiver to collect the rents of real estate owned by James L. Morris, and to manage the business of said Morris until a conservator can be appointed by the Probate Court of Cook County.

Upon the application for appointment of a receiver, a hearing was had upon bill of complaint and affidavits, and oral testimony. An interlocutory order was entered appointing one Frank D. Kitchner as receiver. This appeal is from that order.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for appellant.

M. S. BRADLEY, attorney for appellee; CUTTING, CASTLE & WILLIAMS, of counsel.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

But one question of controlling importance is presented upon this appeal, viz.: whether the suit may be entertained

for the purpose indicated when commenced by an insane person by his next friend.

The grounds for the intervention of a court of chancery are here ample, if the suit were brought by a complainant of sound mind and in his own name. The relation of the parties, the insolvency of defendant, the refusal or failure to account, and the waste alleged, constitute sufficient ground for intervention of a court of equity, if the suit were brought by John L. Morris of sound mind. The question then is, he being a lunatic, could the suit be brought by his brother as his next friend.

The statute, Sec. 13, Chap. 86, R. S., provides as follows in relation to conservators :

“He shall appear for and represent his ward in all suits and proceedings unless another person is appointed for that purpose, as conservator or next friend; but nothing contained in this act shall impair or affect the power of any court to appoint a conservator or next friend to defend the interests of said ward impleaded in such court, or interested in a suit or matter therein pending, nor its power to appoint or allow any person as next friend for such ward to commence, prosecute or defend any suit in his behalf, subject to the direction of such court.”

Could the court then allow Arthur Morris, as next friend, to maintain this suit for the purpose disclosed by the bill?

It is contended by appellant that the question is determined adversely to the maintenance of the suit by the decision of our Supreme Court in *Covington v. Neftzger*, 140 Ill. 608. If the purpose of this suit were merely the termination of the agency created by the power of attorney to appellant and for an accounting, we think it clear that the case would be governed by the *Covington* case, and that the bill would not lie for such purpose when brought by one volunteering as next friend. But here the purpose of the bill is merely to conserve the estate until a conservator might be appointed by the Probate Court.

It would seem upon principle that a court of chancery should have the power to protect the estate of an insane person until a conservator could be appointed by the Pro-

bate Court, to which jurisdiction the appointment of conservators of insane persons is committed by the law of this State. The jurisdiction of the chancellor here, to thus appoint this receiver, can not be maintained upon the ground alone that the subject-matter of the suit is a matter proper for equitable cognizance, that is, the agency, the waste, and the right to an accounting, for in respect to such relief as the complainant might be entitled to in these matters, the suit could not be maintained by one volunteering as next friend, under the decision in the Covington case. But it would seem that the suit may be maintained under the general chancery power to protect the estates of lunatics, and for the limited purpose of such protection only as could be shown to be necessary until a conservator might be appointed by the Probate Court.

In England the care of lunatics and their estates was vested in the sovereign, and although the exercise of this care and control was delegated by the sovereign to the chancellor, yet it was always treated as a special prerogative of the crown, and not as a matter within the general chancery powers.

The question of the inherent powers of our courts of chancery in relation to this subject has been treated differently in different States. In some States it has been held that the subject had so far become a matter of chancery jurisdiction in England, that when by constitution or statute the powers and jurisdiction of the Court of Chancery of England were given to our courts of chancery, this element of jurisdiction was thereby conferred. In others it has been held that the power which the English chancellor exercised in this behalf was not a judicial power, but a delegated prerogative right, derived from the crown, and by special delegation in each instance. But the courts so holding have, at least in some cases, also held that when there was no special provision by the commonwealth giving courts of chancery this jurisdiction and power, yet it was to be considered as arising *ex necessitate* for the protection of the persons and property of the commonwealth.

Whether the conclusion that our courts of chancery have this jurisdictional power is reached by the one process of reasoning or the other, is of little importance. It may be regarded as well settled in our State that the power exists in a court of chancery to conserve the estate of a lunatic, when such action is necessary. *Dodge v. Cole*, 97 Ill. 338.

The question then is, whether such protection may be extended by a court of chancery for the period only which must intervene before a conservator can be appointed by a court of probate. The only contention to the contrary is based upon the decision in the case of *Covington v. Neftzger*, *supra*. The gist of the decision in that case is expressed in the following language of the court:

"A person suing as next friend has no authority to bind the lunatic or his estate. \* \* \* It would be a dangerous rule to hold that such a person might, at his own will or discretion, come into court for the purpose of impeaching a transaction in which he has no interest, as trustee or otherwise, and over which he has no control. \* \* \* We think it is a well settled principle that the person who brings a bill to avoid the deed of an insane person, must have power to act for such person and bind him and his estate."

The court also considered whether the rule of the trial court upon *Covington*, the next friend, to file a bond for costs, amounted to an order authorizing him to sue. It seems clear that the court did not intend to hold that the trial court might not in any case "allow" a suit to be maintained by a next friend, and did not construe the section of the statute above set forth to that effect. What the decision does hold is that a volunteer can not thus elect to set aside the deed of the lunatic. And there is a distinction indicated between an attempt to procure equitable relief in chancery by setting aside a deed for a lunatic who appears only by next friend, and an effort merely to protect the estate of the lunatic through a suit brought by next friend until a committee or conservator can be appointed to represent him.

The case of *Jones v. Lloyd*, 18 Law Rep. Eq. Cas. 265, which is cited in the *Covington* case and quoted from for

## Roughan v. Morris.

the express purpose of illustrating this distinction, would seem to precisely apply to the conditions here presented. In that case the court said:

“Can a suit be instituted by the lunatic, not found so by inquisition, by his next friend? I have no doubt it can. There is authority upon the subject, and it seems to me so distinct that I have no occasion, really, to refer to the reason, for I think the cases of *Light v. Light* (25 Beav. 248) and *Beall v. Smith* (Law Rep. 8 Ch. 85) are such authorities; but independently of the unreported case of *Fisher v. Nelles*, where I know the point was discussed, and independently of authority, let us look at the reason of the thing. If this were not the law, anybody might, at his will and pleasure, commit waste on a lunatic's property, or do damage or serious injury and annoyance to him or his property, without there being any remedy whatever. In the first place, the Lord Justices or the Lord Chancellor are not always sitting for applications in lunacy. In the next place, if they were, everybody knows it takes a considerable time to make a man a lunatic by inquisition. \* \* \* Is it to be tolerated that any person can injure him or his property without there being any power in any court of justice to restrain such injury? Is it to be said that a man may cut down trees on the property of a person in this unfortunate state, and that because no effort of his can be made, no member of his family can file a bill in his name as next friend, to prevent that injury? Is it to be allowed that a man may make away with the share of a lunatic in a partnership business, or take away the trust property in which he is interested, without this court being able to extend its protection to him by granting an injunction at the suit of the lunatic by a next friend, because he is not found so by inquisition? I take it those propositions, when stated, really furnish a complete answer to the suggestion that he can not maintain such a suit. Of course they do not answer the question as to how far he may carry it; but that he can maintain such a suit for the purpose of protection, for the purpose of obtaining, as in this case, a receiver, I should think there can be no doubt whatever.”

Other decisions holding to like doctrine are: *Reese v. Reese*, 89 Ga. 645; *Whetstone v. Whetstone*, 75 Ala. 495.

We are of opinion, therefore, that while under the decision in the *Covington* case this suit brought by next friend

might not be maintained for the ultimate purpose alone of annulling the deed by which the agency of the defendant was created, nor for the obtaining of an accounting alone, yet it may be maintained for the sole purpose of protecting the estate of the lunatic, through a receivership, until a conservator can be appointed to act for him.

The order is affirmed.

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**Barney J. Huening and Henry J. Huening v. Margaret Buckley et al.**

1. **HOMESTEAD EXEMPTION—Liability Incurred for the Purchase, or Improvements.**—Under the statute (Sec. 3, Chap. 52, R. S. 1897) no property is exempt as a homestead for a debt or liability incurred for the purchase or improvement of the same.

2. **EXEMPTIONS—Duty of the Sheriff.**—When the sheriff receives an execution and is directed by it and the plaintiff therein named to serve it, it is his duty to serve the writ and to inquire whether the claims of the defendants that levied upon is exempt or not, and for failure so to do, is liable to an action.

3. **PRACTICE—In Actions Against Sheriff for a Failure to Execute a Writ.**—It is not necessary for a person aggrieved to resort to a separate action at law against the sheriff for his failure to execute the writ. He may proceed in the court from which the writ issued, by motion or petition, for a rule on the sheriff to show cause why he should not be dealt with for contempt in disobeying the writ.

4. **SHERIFFS—Duty to Execute Process—Remedy for a Failure.**—It is the business of the sheriff to execute process regular upon its face and emanating from a court of competent jurisdiction, and this court has no doubt of the power of the court issuing the process upon motion, with notice to the parties concerned, and a showing that the property levied upon is claimed as a homestead, and the basis of the debt in question was for the improvement of such homestead, to order the sheriff to proceed with its sale.

5. **BURDEN OF PROOF—When Premises are Claimed as a Homestead.**—Where real estate is claimed to be exempt as a homestead it devolves upon the plaintiff in execution, after it is shown that the debtor is within the statute, to rebut it, by establishing that the debt, or a part of it, was for the purchase money, or improvements made upon the homestead.

**Creditor's Bill.**—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 26, 1900.



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Huening v. Buckley.

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**Statement by the Court.**—Appellants recovered a judgment in the Cook County Court against appellee Buckley, on which execution was issued and placed in the sheriff's hands, with directions to levy upon and sell certain real estate claimed to be owned by and in the possession of said Buckley. The execution was levied, but before the time fixed for sale, Buckley falsely and fraudulently claimed rights of homestead exemption in and to said real estate, and represented to the sheriff that the indebtedness on which said judgment was based was not incurred for the improvement of said real estate, which it is alleged was untrue, and on the contrary, that the debt contracted by said Buckley to appellants was for work and labor performed and materials furnished and used in the improvement of said real estate. The record of the judgment failed to show that the debt on which it was based was for the improvement of the real estate.

By reason of said claim and representations of said Buckley to the sheriff, and because appellants refused to advance his fees to pay commissioners to appraise the value of said real estate and set off the homestead, he refused to proceed with the sale of the real estate, and at the end of ninety days returned the execution no part satisfied.

The real estate is incumbered and the equity of Buckley therein is worth less than \$1,000.

Appellants filed their bill in the Circuit Court, which alleges, in substance, the matters above stated, and it also contains the usual and ordinary allegations of a creditor's bill, and makes the other appellees herein parties, alleging that they are indebted in divers amounts to the appellee Buckley.

The bill prays for discovery, that Buckley be decreed to pay the judgment, that an injunction issue restraining her from disposing of her property, for the appointment of a receiver, and among other things, that the court may decree that said judgment was rendered for an indebtedness incurred for the improvement of said real estate, and that the same be ordered sold, free and clear of any right

or claim of homestead or exemption of said Buckley, and for general relief.

Appellees demurred generally and specially to the bill, and among the special causes of demurrer assigned was that appellants had a complete, adequate and sufficient remedy at law. The demurrer to the bill was sustained and the bill dismissed for want of equity, from which decree the appellants prosecute this appeal.

WILLIAMS & KRAFT, attorneys for appellants.

No appearance by appellees.

MR. JUSTICE WINDES delivered the opinion of the court.

The only question necessary to be considered is whether appellants have a complete, adequate and sufficient remedy at law to enforce their judgment against the appellee Buckley. If they have, then the decree dismissing the bill was proper, and it will be unnecessary to consider the other questions raised by appellants.

Sec. 3, Chap. 52, Rev. Stat. Ill. (1897), with reference to exemptions of homestead, provides that no property shall, by virtue of the act, be exempt from sale "for a debt or liability incurred for the purchase or improvement thereof."

It is claimed that because Buckley fraudulently represented to the sheriff that she had a claim or right of homestead in said real estate, and that the debt on which said judgment was based was not incurred by her for the improvement of said real estate, that therefore appellants have the right because of such fraudulent claim and representations to come into equity for relief.

The record of the judgment of the County Court, it is true, does not show that it was based upon a claim for the improvement of the real estate, but the sheriff was directed by the writ of execution in his hands and by the appellants to sell this real estate. It was his duty to serve the writ and to inquire whether or not the claim of appellee was true that the property levied upon by him was exempt, and

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for failure so to do is liable to an action. Crocker on Sheriffs, Sec. 851; Starr & C. Stat., Ch. 125, Sec. 15.

But it is not necessary that appellants have resort to their action against the sheriff for his failure to execute the writ. They may proceed in the County Court by motion or petition for a rule on the sheriff to show cause for not making the sale, or for contempt in disobeying the writ. Murfree on Sheriffs, Secs. 956, 963 and 964; Starr & C. Stat., Ch. 125, Sec. 16.

Our statute does not specifically provide as to final process for the practice of proceeding against the sheriff by motion or for contempt, but it has been repeatedly decided that it is the business of the sheriff to execute process regular upon its face and emanating from a court of competent jurisdiction, and we have no doubt of the power of the County Court, upon motion, notice to the parties concerned, and a showing that the basis of the debt in question was for the improvement of this real estate, to order the sheriff to proceed with its sale, notwithstanding the claim of the appellee Buckley to the contrary. People, for use, etc., v. Palmer, 46 Ill. 398; Stevenson v. Maroney, 29 Ill. 532; White v. Clark, 36 Ill. 285; Wiggins v. Chance, 54 Ill. 178; Bush v. Scott, 76 Ill. 524; Bach v. May, 163 Ill. 547.

In the Stevenson case, *supra*, it appears that a motion was made in the Circuit Court to vacate a levy and sale of certain lots by virtue of two executions of that court, for the reason that the lots were the homestead of the defendant in the execution, at and before the time the judgments were recovered upon which the executions were issued, and because the lots, with their improvements, were not worth \$1,000. The motion was overruled, but the Supreme Court reversed the judgment, saying, among other things, "that in such a proceeding it devolves upon the plaintiff in execution, after it is shown that the debtor is within the statute, to rebut it, by establishing that the debt, or a part of it, was for the purchase money or improvements made upon the homestead. \* \* \* When the creditor affirms that his debt was incurred for the purchase money or improvement of the homestead, no reason is perceived why

he should not be required to establish that fact. Where the debtor has shown that he is within the provisions of the enacting clause of the first section (referring to the statute in question), he is *prima facie* entitled to its benefits. And it must be rebutted by the creditor to subject the property under the provisions of the second section."

The court then says that as there is no mode pointed out by the statute as to how the rights of parties in such matters are to be ascertained, it must be regulated by the courts; and that while it would be a proper method to make proof and have the fact found by the court rendering the judgment that the debt or any portion of it was created for the purchase or improvement of the homestead, it does not wish to be understood as saying that this should be the only mode, and that when the question should afterward arise, "on motion or otherwise, he must be held to establish and show what portion of his judgment is for purchase money or improvements, before he can sell the homestead, if of less value than \$1,000."

This case has been cited with approval in three of the cases above noted, the practice of presenting such matters to the court by motion, as there indicated, not being disapproved; and for the reasons that this method of procedure obtains in other jurisdictions, and would seem to be proper under the provisions of the statute, we are of opinion that appellants have a clear and complete remedy at law by motion in the County Court to have the matter adjudicated as to whether their claim, on which the judgment is based, was incurred for the improvement of the real estate in question.

Appellants made no basis by their bill to sustain it as a creditor's bill solely because there was no return of the execution *nulla bona*, and besides, its allegations show that the real estate in question was subject to their judgment, the title thereto being of record in the name of the debtor, and no reason why it should not have been sold by the sheriff for their claim.

The decree of the Circuit Court is therefore affirmed.

## Fred Krickow v. Pennsylvania Tar Mfg. Co.

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1. **RELEASE OF ERRORS**—*In Warrant of Attorney to Confess Judgment*.—A release in a warrant of attorney to confess a judgment and a cognovit expressly releasing all errors intervening in entering the judgment is conclusive against the defendant, unless for lack of jurisdiction in the court to enter the judgment, or of lack of power under the warrant to confess it.

2. **JUDGMENTS BY CONFESSION**—*Motions to Vacate*.—A motion to vacate a judgment entered by confession, is an appeal to the equitable jurisdiction exercised by courts of law over judgments by confession, and where such equitable jurisdiction is invoked, a judgment by confession will not be set aside except for equitable reasons made to appear.

3. **INFANTS**—*When Not to be Relieved from Their Contracts*.—Where an infant, engaged in business on his own account, gave a judgment note for a small balance remaining due and unpaid of large dealings, running through several years, upon which judgment was entered, made a motion to vacate the judgment upon the ground that an infant is not liable upon his contracts, but made no offer to pay the balance due upon the amount, and asked the application in his behalf of the rule of law of non-liability for his contracts, the court below properly refused to vacate the judgment.

**Motion to Vacate a Judgment**.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 27, 1900.

WILLIAM SCHULZE, attorney for appellant.

CHAS. W. LAMBOEN, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This appeal is said by appellant, in his statement of facts preceding his brief, to be "from a judgment of the Superior Court in favor of the defendant in error, and against the plaintiff in error, for \$92.38. Also from an order of court overruling the motion made by the appellant to vacate the judgment and to appoint a guardian *ad litem* to defend said case."

The correctness of such statement is denied by appellee,

and the record sustains the denial in so far as a motion for the appointment of a guardian *ad litem* for appellant, and the overruling of the same, is concerned. We find nothing in either the abstract or the record that shows such a motion or any action by the court with reference thereto. Indeed, it is not at all certain what this appeal is from.

The record shows that from an overruling of "defendant's motion to vacate the judgment herein," an appeal was prayed and allowed, but the only appeal bond filed, recites the praying and obtaining of an appeal from the money judgment of \$92.38, and not from any other judgment or order.

That judgment was obtained by confession, upon a declaration, note, warrant of attorney and a cognovit. The cognovit followed the power contained in the warrant of attorney and expressly released all errors intervening in entering the judgment, and the effect of such a release of errors is conclusive against the appellant, unless for lack of jurisdiction in the court to enter the judgment, or of power under the warrant to confess the judgment. *Hall v. Hamilton*, 74 Ill. 437; *Frear v. Commercial National Bank*, 73 Ill. 473; *Little v. Dyer*, 35 Ill. App. 85.

It is not claimed, in argument, that the court did not have jurisdiction to enter the judgment, or that the power, under the warrant of attorney, to confess the judgment, did not exist, except in so far as those questions are involved in the claimed fact that appellant was a minor at the time. If the appeal is only from the money judgment, and not from the order overruling the motion to vacate the judgment, what we have said disposes of the case.

But, inasmuch as both sides treat the appeal as from the order overruling the motion to vacate the judgment, we will pass upon that aspect of the case.

A motion to vacate a judgment entered by confession, is an appeal to the equitable jurisdiction exercised by courts of law over judgments by confession, and where such equitable jurisdiction is invoked, a judgment by confession will not be set aside except for equitable reasons made to appear.

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Packer v. Roberts, 140 Ill. 9; Boston, etc., v. Fisher, 59 Ill. App. 400.

Substantially the only equity of appellant which is made to appear against the judgment, has for its basis the common law rule that an infant is not liable upon his contracts, except for necessities.

The appellant was in the roofing business in his own name, and the roofing material for which the note in question was given, was used by him in such business. According to his own affidavit, the note was for "a small balance remaining unpaid of large dealings, running through several years, with plaintiff."

Under such circumstances, even if it be conceded that appellant was under age, the proof of which is not conclusive, he should not be relieved, in equity, from his debt, without offering to do equity himself. He makes no offer to pay what the material was reasonably worth, but only asks the application in his behalf of the rule of law of non-liability for his contracts. We think the Superior Court properly refused to vacate the judgment. The claimed interlineations of the pronouns "I" and "me," and the word "ten," in the warrant of attorney, after the delivery of the note, were not proven with sufficient certainty, even if in any respect material to overcome the presumption against alteration in such respects, and the evidence to the contrary.

The judgment of the Superior Court should be affirmed, and it is so ordered.

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Charles W. Munson v. Milo D. Fenno and Stephen M. Titus.

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1. REAL ESTATE BROKER—*Right of Recovery Under the Common Counts—License.*—Proof in the first instance that the plaintiffs were licensed real estate brokers is unnecessary to a recovery under the common counts.

2. COURTS—*Judicial Notice of Ordinances Requiring License.*—There

is no statute requiring a license by real estate brokers, and courts can only take notice that there is an ordinance requiring such license by a pleading or proof of such fact.

8. PRESUMPTIONS—*As to Licenses in the Absence of Proof.*—In the absence of proof to the contrary a license to act will always be presumed.

Assumpsit, for commissions. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 26, 1900.

JAMES HIBBEN, attorney for appellant.

E. G. LANCASTER, attorney for appellees.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellees, who were partners as real estate brokers in Chicago, recovered a verdict of \$1,100 for commissions upon a sale of certain real estate of the appellant, on which judgment was rendered, from which this appeal is taken. The declaration consists of a special count for commissions, in which it is alleged, among other things, that at the time of the sale the plaintiffs were "real estate brokers, duly licensed as such in Cook County," and also the common counts. The only plea was the general issue.

It is claimed on behalf of appellant, first, that appellees, in order to recover, should have proved that they were real estate brokers, duly licensed as such in Cook county; second, that the general issue compelled them to make such proof; third, that appellees failed to prove they were the procuring cause of the sale; and fourth, that there is a lack of necessary parties.

As to the first point, it is sufficient to say that as the common counts were part of the declaration, and the evidence, in our opinion, is sufficient to sustain a judgment on the common counts, it was unnecessary for appellees to prove their case under the first count. Consolidated Coal Co. v. Scheiber, 167 Ill. 539, and cases cited; Swift v. Rutkowski, 182 Ill. 18-22.



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As to the second point, proof, in the first instance, that appellees were licensed real estate brokers, was unnecessary to a recovery under the common counts. There is no statute requiring a license by real estate brokers in the county, and we can only take notice that there is an ordinance of the city of Chicago requiring such license by a pleading or proof of such fact. There was no pleading on behalf of defendant nor proof in that respect, and we therefore are of opinion this claim is not tenable. *Eckert v. Collot*, 46 Ill. App. 362; *Ry. Co. v. Klauber* 9 Id. 613-9; *R. R. Co. v. Godfrey*, 71 Ill. 500; and *Schendorf v. Gorman*, No. 8449 of this court, not reported, in which last case it was held a license will be presumed in the absence of proof to the contrary.

As to the third claim, that appellees were not shown to be the procuring cause of the transaction which resulted in the sale of the property, the evidence shows, in substance, as follows: Appellant employed the appellees to make a sale of the property in question, and agreed that he would pay them the regular commission (which is agreed was three and one-half per cent upon the selling price) upon any deal which he might accept; one Martineau, who was an employe of appellees, presented the property in question for sale to a Mr. Monk, and gave to him a price of \$45,000; Monk wrote out a memorandum of a proposition for the purchase from Munson, which Martineau took to Munson, but Munson said he would not accept it. Martineau reported this fact to Monk, when Monk asked who was Munson's attorney, whereupon Martineau told him that Mr. Hibben was his attorney, to which Monk replied that Mr. Hibben was *his* attorney. Monk then saw Hibben, and after negotiations between Monk, Hibben and Munson, which extended over a period from July to December, a sale was perfected, by which Monk became the purchaser of the property at the price of \$44,000.

There is some conflicting evidence tending to show that appellees were not the procuring cause of the sale of the property to Monk, but when it is all considered, we can not

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say that the verdict of the jury to the contrary is not sustained by the evidence, and are of opinion it should not be disturbed for that reason. Incidentally, it is claimed under this point that there was error in the court's rulings on evidence and instructions. We have examined these matters and think there is no reversible error in the respects claimed.

As to the fourth point, we think the evidence fairly shows that Martineau was the employe of appellees, and not a partner with them. The fact relied on as showing that he was a partner, viz., that by his arrangement with appellees he was to receive five-elevenths of the commissions, is entirely consistent with his being an employe and not a partner.

The judgment will therefore be affirmed.

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**Chicago Pressed Steel Co., James W. Wilson and George W. Boyce v. Jane Clark.**

1. **ESTOPPEL**—*To Plead Non Est Factum by Recitals in a Bond.*—Where a bond is given to secure the payment of the rent reserved in a lease and the performance of its covenants on the part of the lessee, and which lease is set out as a part of the condition of the bond, the obligors are estopped by their recitals in the bond to deny the execution of the lease, by a plea of *non est factum*.

2. **DEEDS**—*Delivery, When Absolute.*—If a deed is delivered to a party or his agent, and not to a stranger, it is an absolute delivery, and parol evidence of conditions qualifying such delivery is inadmissible.

3. **EVIDENCE**—*Extrinsic Proof Competent to Identify the Subject-Matter of a Contract.*—Extrinsic proof is always competent to identify the subject-matter of a contract.

**Debt, on bond.** Error to the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed February 26, 1900.

GEORGE A. GARY, attorney for plaintiffs in error; FAYETTE J. PARTRIDGE, of counsel.

HUTCHINSON & FAIRCHILD, attorneys for defendant in error; JOHN W. BECKWITH, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is error to reverse a judgment recovered by defendant in error against plaintiffs in error in an action of debt on a bond. The bond is dated August 2, 1897, and is signed and sealed in the names of plaintiffs in error. The condition of the bond is as follows:

“The condition of this obligation is such, that if the said The Chicago Pressed Steel Company, lessee, in a certain written lease made by the said Jane Clark, and bearing even date herewith, demising a certain rolling mill in the County of Muscatine, State of Iowa, shall well and truly pay, or cause to be paid, as the same shall become due, the rents reserved in said lease, and shall faithfully keep and perform all of the covenants in said lease contained on the part of the lessee to be kept and performed, then this obligation shall be void, otherwise to be and remain in full force and virtue.”

The declaration avers the execution of the bond by plaintiffs in error, sets forth the condition thereof, and alleges that by the written lease in the condition of the bond mentioned, the plaintiff demised to the Chicago Pressed Steel Company “lots nine (9), ten (10), in block sixty-one (61), all of block sixty-two (62) and all of block sixty-three (63) in Park Place addition to the city of Muscatine,” as shown by the official plat in office of county recorder of Muscatine County, “together with all her right, title or claim in and to any of the grounds situate between blocks sixty-one (61) and sixty-two (62), and all the buildings, improvements, mills and machinery, whether fixed or movable, now situate in, upon or about said premises, and all tackle, tools, implements, and things upon said premises properly used in the rolling mill business and belonging to the said party of the first part, and all switches, tracks and railways and railway facilities owned by the said Jane Clark, connecting said mill with neighboring railways; to have and to hold the said described premises from the day of the date hereof to the first day of August, A. D. 1898, yielding and paying thereout the rent for said term of three thousand (3,000) dollars to be paid quarterly in advance,” \$750 on day of date thereof, and \$750 November 1, 1897, February 1, 1898,

and May 1, 1898. That Chicago Pressed Steel Company did thereby covenant with Jane Clark that it would pay said rent as provided," etc.

The declaration avers default in the payment of all rent, etc.

Plaintiffs in error pleaded three pleas: 1. *Non est factum* verified as to the bond. 2. *Non est factum* verified as to the lease. 3. A special plea. The court sustained demurrers to the second and third pleas, and the cause was tried by the court, without a jury, by agreement of the parties, the only issue being that made by the first plea, the plea of *non est factum* as to the bond.

The court found for defendant in error, assessed her damages at the sum of \$3,000, the amount of rent due by the terms of the lease, and rendered judgment for that sum.

It is contended by counsel for plaintiffs in error that the court erred in sustaining the demurrers to the second and third pleas. Counsel, in their argument, say that the plaintiff below counted on the lease. The declaration was on the bond, not on the lease, but it was necessary to aver a breach of the condition of the bond; and for this purpose, and this only, the allegations that there was a demise reserving rent, and that the rent reserved had not been paid, were made.

The second plea, *non est factum* as to the lease, is bad, and the demurrer to it was properly sustained. It is recited in the condition of the bond that the Chicago Pressed Steel Company is lessee in a certain written lease made by Jane Clark, of even date with the bond, and the obligation of the plaintiffs in error is stated to be to pay the rents reserved by the lease. The recital that there was a written lease in which the Chicago Pressed Steel Company is lessee, is of a vital fact on which depends the liability of the obligors, and plaintiffs in error are estopped to deny the truth of the recital by plea or otherwise. *Otto et al. v. Jackson*, 35 Ill. 349; *Arnott et al. v. Friel*, 50 Ib. 175; *George v. Beachoff et al.*, 68 Ib. 236; *Herrick et al. v. Swartwout*, 72 Ib. 341; *Mix et al. v. The People*, 86 Ib. 329; 1 *Jones on Evidence*, Sec. 283; 20 *Am. & Eng. Ency. of Law*, 1 Ed. p. 458.

The substance of the third plea is thus stated in the abstract of the pleadings :

“ That said supposed bond and supposed lease in declaration mentioned were signed on the same occasion and in the same transaction so far as they were signed by defendants; that before the signing thereof certain negotiations for the leasing of the premises and property mentioned in said declaration, by said plaintiff to said Steel Company, were had between said company of the one part, and one J. M. Gobble, of Muscatine; that Gobble was agent and representative of plaintiff; that no negotiations for the leasing of said premises and property to said company were had on its part with plaintiff personally; but all said negotiations were had with Gobble, as agent; that at the time of the signing by defendants, of the pretended bond, and the signing by the Steel Company of the pretended lease, the Steel Company, through its officers and agents, stated to and informed Gobble, then acting as plaintiff's agent, that the Steel Company was not then and there prepared to enter into lease and accept same from plaintiff, and would not then enter into and accept same; that thereupon, at the special instance and request of Gobble, it was expressly agreed by and between Gobble, as agent, of the one part, and the Steel Company, through its officers and agents, and also the other defendants, of the other part, that said defendants in said cause should sign the pretended bond and the Steel Company should sign on its part the pretended lease, and that Gobble should keep and hold said pretended lease and bond in his possession until the Steel Company should decide upon its part, to enter into and take said lease from plaintiff, and that Gobble should keep and hold said bond and lease subject to such decision of the company; that thereupon defendants then and there signed said bond and said Steel Company, through its officers, signed said pretended lease upon its part in duplicate, and Gobble received into his possession and custody said supposed bond and retained both copies of said supposed lease in his possession and custody, and continued to keep and retain the same, so far as defendants were concerned, upon the express agreement aforesaid; that the Steel Company has never accepted nor agreed to accept and enter into and execute said supposed lease, and has never at any time entered into and executed said lease nor any lease from or with said plaintiff.”

The demurrer was properly sustained to this plea.

First: The condition of the bond recites that Jane Clark, defendant in error, demised to the Chicago Pressed Steel Company, a certain rolling mill in the county of Muscatine, Iowa. This clearly imports a present demise, and not one to take effect upon a future contingency. The plea purports to contradict this recital by denying the demise, which it is estopped to do.

Second: The plea is, in substance, that the bond and the lease were placed in escrow in the hands of one who was the agent of the plaintiff for the purpose of leasing the premises.

The delivery of the bond to the agent of the obligee, could not be a delivery in escrow.

In *Cocks v. Barker et al.*, 49 N. Y. 107, cited with approval in *Ryan v. Cooke*, 172 Ill. 302, the court say:

"Neither could the delivery of the bond be shown by parol as in escrow, or conditional. It was delivered to the agent of the plaintiff, which was of the same effect as if delivered to the plaintiff in person. If a deed is delivered to the party or his agent, and not to a stranger, it is absolute, and parol evidence of condition qualifying the delivery is inadmissible."

In *Ryan v. Cooke*, *supra*, the court (p. 311) say:

"The rule is well settled that if a deed is delivered to a party or his agent, and not to a stranger, it is absolute, and parol evidence of conditions qualifying the delivery is inadmissible," citing *Cocks v. Barker*, *supra*.

See also *McCann v. Atherton*, 106 Ill. 31; *Stevenson v. Crapnell*, 114 Ill. 19.

Third: The plea questions the delivery of the bond. Delivery is an element in the execution of the bond. Therefore, the facts alleged in the plea, if they constitute a valid defense, were provable under the plea of *non est factum* as to the bond. 1 Chitty's Pl., 9th Am. Ed., 483.

On the hypothesis, to which we do not assent, that the demurrer to the plea was erroneously sustained, plaintiffs in error were not prejudiced, because the court permitted them to introduce evidence tending to prove the facts alleged in the third plea, which evidence was contradicted

by evidence introduced by defendant in error; and we are of opinion that the evidence was such as to warrant the court in finding that there was, in fact, a delivery to defendant in error of both the bond and the lease.

It is contended that the court erred in admitting the lease in evidence, because, as counsel argue, it is not the lease referred to or described in the condition of the bond. The date of the bond is August 2, 1897, and the lease referred to in its condition is "a certain written lease made by the said Jane Clark, and bearing even date herewith, demising a certain rolling mill in the county of Muscatine, in the State of Iowa," in which lease the Chicago Pressed Steel Company is lessee. The lease introduced in evidence is dated August 2, 1897, is made, signed and sealed, by Jane Clark as lessor, runs to the Chicago Pressed Steel Company as lessee, and is signed in the name of that company by James W. Wilson, president. The name of A. M. Weeden, secretary, is also signed to the lease, and the corporate seal of the company is affixed to it. The lease demises certain lots by description in Muscatine county, in the State of Iowa, "and all buildings, improvements, mills and machinery" on the described premises, "and all tackle, tools, implements and things upon said premises properly used in the rolling mill business," etc., "and all switches, tracks and railways and railway facilities owned by the said Jane Clark, connecting said mill with neighboring railways." We think it sufficiently appears, from comparison of the condition of the bond with the lease, that the lease is the one referred to in the condition of the bond. There is no evidence that any other lease was executed by Jane Clark to the Chicago Pressed Steel Company August 2, 1897, or any other time. As matter of law it certainly can not be presumed that there was any other lease, and if there was, it was incumbent on plaintiffs in error to prove it. *Beckwith v. Talbot*, 95 U. S. 289, 292.

Counsel for plaintiffs in error object to the admission by the court of parol evidence tending to prove that the lease put in evidence was the lease intended or referred to

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by the condition of the bond. While we are of opinion that such evidence was unnecessary, we are also of opinion that it was not error to admit it. As said by the court in *Bulkley v. Devine*, 127 Ill. 406, "Extrinsic proof is always competent to identify the subject-matter of a contract, if necessary, and to admit it in no way violates the rule that parol testimony is never admissible to contradict or vary the terms of a written contract," citing numerous authorities.

See also *Forst v. Leonard*, 112 Ala. 296, 303; 1 *Greenleaf on Ev.*, 13th Ed., Sec. 286; 2 *Jones on Ev.*, Sec. 455; *Brown on Stat. of Frauds*, Sec. 375a.

But if it should be conceded that the evidence is incompetent, the trial being by the court, without a jury, it must be presumed that the court ignored it. *Merchants Desp. Trans. Co. v. Joesting*, 89 Ill. 152; *Dorsey v. Williams*, 48 Ill. App. 386; *Hobart v. Hobart*, 53 Ib. 133.

We find no reversible error in the refusal of propositions submitted by counsel of plaintiffs in error to be held as law in the case.

The judgment will be affirmed.

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### Francis Hutchison v. Louis H. Sullivan.

1. *PRACTICE—Propositions of Law.*—Under the statute providing that parties may submit to the court written propositions to be held as law in the decision of the case, either party may submit propositions embodying his theory of the case as exemplified by the evidence.

*Assumpsit*, for services of an architect. Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Mr. Justice SHEPARD dissenting. Opinion filed February 27, 1900.

JAMES F. HUTCHISON, attorney for appellant.

FELSENTHAL, D'ANCONA & FOREMAN, attorneys for appellee.



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MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit upon the common counts, wherein appellee seeks to recover for services rendered in the preparation of preliminary plans and sketches for a proposed "Coliseum Building," which it was then hoped might be erected on what is described as the "Old Base Ball Grounds," in the city of Chicago.

Appellee testifies that the purpose of the plans and sketches was to enable appellant "to place the matter intelligently before the people that he wished to interest financially;" that the price agreed upon for these preliminary or promotion plans was \$400, and that he stated to appellant "that my interest must be protected, so that when the matter passed out of Mr. Hutchison's hands I should be sure that I would be the architect of the building when the building was erected;" to which he states appellant agreed. In other words, appellee's version of the agreement is that he was to prepare the preliminary or promotion plans, upon the condition that if the scheme succeeded and the building should be erected, he should be its architect, and if the scheme did not succeed, then he was to receive \$400 from appellant for the preliminary plans.

Appellant on the other hand, claims that the contract contained no such condition. His statement is to the effect that after preparing the promotion sketches, appellee refused to permit them to be used for the purpose for which they were made, viz., to be shown to prospective investors as a means of promoting the scheme, thus violating the agreement; that the agreement was that appellee should receive \$400 in sixty days for the preliminary plans to be used for promotion, which were to be furnished in thirty days, and that subsequently appellee endeavored to force him into signing a new contract in writing, wherein he should agree to make appellee architect of the building if constructed. This proposed contract bearing appellee's signature, was introduced in evidence, together with the following letter:

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"MAY 4, 1898.

FRANCIS HUTCHISON, Esq.,

664 W. Adams St., City.

DEAR SIR: I learn from Mr. O'Neill's office that you have not yet affixed your signature to our contract with reference to the proposed Coliseum. Kindly do so without further delay, as I shall otherwise not be in a position to show any documents to your people on Saturday, as I desire to have my own relations to the project definitely established, and this at present can only be done through your signature to the document.

Yours truly,

LOUIS H. SULLIVAN."

The cause was submitted to the court without a jury.

The statute provides that either party may submit to the court written propositions to be held as law in the decision of the case. (Sec. 42, Practice Act.) In accordance with this provision, appellant's counsel submitted the following:

1. That if the plaintiff entered into a contract with the defendant to furnish promotion plans for a Coliseum building for the sum of \$400 to be paid in sixty days, and the plaintiff afterward notified the defendant that he would not allow the defendant the use of the plans for the purpose for which the defendant contracted for the same, that is, in the promotion of the building of the Coliseum, unless the defendant should sign a contract with the plaintiff for all the work of an architect on the said Coliseum, which contract contained an agreement making the said contract a lien on the defendant's interest in the land, the plaintiff can not recover and the finding should be for the defendant.

This proposition is in effect that if the court finds the facts as appellant claims they are shown to be by evidence introduced in his behalf, then, under the law applicable to such a state of facts, the finding must be in his favor. The contention between the parties is one of fact, viz., what was the contract. Appellant claims the contract was that appellee should furnish promotion plans, for which he was to be paid \$400 in sixty days. If this was the contract

and appellee afterward refused to perform his part of it unless appellant would sign a new contract with additional provisions forming no part of the original agreement, then appellee would not be entitled to recover and the court should have so held as a proposition of law. If, on the other hand, the contract as originally made contained an additional provision that appellant should sign a written contract like the one in evidence as a condition precedent to being furnished with the promotion plans, and he refused so to do, then, under the law applicable to such facts, appellee might recover. Appellant was, however, entitled to have the court hold as law a proposition stating a correct rule applicable to his theory of the case so far as it was sustained by evidence. The court may have found the facts against appellant, but having refused to hold, as requested, a correct rule of law applicable to one state of the facts which there is evidence to support, we can not now determine whether the judgment is based upon a finding of the facts in favor of appellee, or upon an erroneous view of the law.

We think it was error to refuse to hold appellant's first proposition as law, and the judgment of the Superior Court must be reversed and remanded.

MR. JUSTICE SHEPARD, dissenting.

In my opinion the proposition of law referred to was properly refused to be held. It contains only a partial hypothesis based upon appellant's theory of the case, and has no reference to appellee's theory, which, as disclosed by the evidence, admitting all that appellant's evidence shows the contract to have been, is that the contract included the further element that appellee should be employed as architect of the building if the same should be proceeded with.

**Louise Graves v. Helen Ahlgren.**

1. **EXEMPTIONS—Wages of Laborers and Servants.**—Where a judgment is for the wages of a laborer or servant, no personal property is exempt from the levy under execution, provided the court finds that the demand sued for is for such wages, and the finding is so expressed in the record of the judgment and indorsed on the execution.

2. **WAIVER—Taking a Note in Liquidation.**—The taking of a note by a laborer or servant for wages due him serves merely to liquidate the demand and not to waive the lien given by the statute.

3. **LIENS—Assignment of the Note.**—The note, when taken, is only evidence of the debt, and can not be held to affect the lien; but the lien creditor must be in control of the note in order to have judgment, and is bound to produce it, or account for its non-production.

**Assumpsit, for wages.** Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 27, 1900.

C. A. SURINE, attorney for appellant.

EWING, WINCHESTER & CRAIG, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This was a suit by appellee, originally before a justice of the peace, to recover wages as a servant, and judgment was there rendered in her favor. This was affirmed upon appeal by the Circuit Court. The statute provides that "when the debt or judgment is for the wages of any laborer or servant," no personal property shall be exempt from the levy under the execution, provided the court shall find the demand sued for is for such wages, and the finding is so expressed in the record of the judgment and indorsed on the execution. R. S., Chap. 52, Sec. 16.

When appellee left the service of appellant, there was a balance of \$150 due the former for wages as a domestic servant. For this sum she took appellant's note. The note, bearing indorsements of certain payments, was introduced in evidence. Appellant's counsel objected that inasmuch as

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the suit was not originally brought upon the note, but for the recovery of wages, the note created a new and different cause of action. It is of course immaterial, the cause being tried *de novo* in the Circuit Court, what the evidence was before the justice. But it is urged that the judgment can not now be successfully pleaded in bar to an action on the note; and that it was error, the note having been introduced, to render judgment for wages as a servant, thus exposing appellant's personal property to levy, without regard to exemptions.

There is no proof that the note was taken in payment of the debt for wages. Appellee testifies that she took the note to evidence the debt; and appellant states that she did not have the money to pay appellee when the latter was ready to go, and herself suggested giving the note. A note so given merely serves to liquidate the demand, not to waive the lien. *Paddock v. Stout*, 121 Ill. 571 (579), and cases there cited. The note, when taken, was only evidence of the debt, and can not be held to affect a lien. *Brady v. Anderson*, 24 Ill. 111 (113). But the lien creditor must be in control of the note in order to have judgment. *Bayard v. McGraw et al.*, 1 Ill. App. 134 (141), and is bound to produce it, or account for its non-production. *Kankakee Coal Co. v. Manufacturing Co.*, 128 Ill. 627 (630).

It expressly appears in the case at bar that the note in question was taken as evidence of the debt. It is conceded the debt was for wages earned as a servant. The debt has not been paid. The note, by its terms overdue, was in the possession of and owned by appellee, and was introduced by her in evidence. The debt having been reduced to judgment, the note is merged therein, and action upon it barred. The debt being for wages, judgment therefor was properly rendered. The judgment of the Circuit Court is affirmed.

**E. H. Neiman v. Morris Wheeler and Mary Wheeler.**

1. **TENDER**—*In Foreclosure Suits*.—A tender in a foreclosure proceeding which does not include solicitor's fees nor costs is insufficient.

2. **COSTS**—*In Chancery Suits*.—The award of the costs in a chancery proceeding is within the discretion of the chancellor; but that discretion must be fairly exercised and may be reviewed.

**Foreclosure**.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded with directions. Opinion filed February 26, 1900.

**Statement**.—Appellant filed her bill of complaint, to foreclose a chattel mortgage given by appellees upon their household goods. The answer of appellees admitted the mortgage, default in payment of the principal note thereby secured, and alleged that interest notes were given to secure payment of usurious interest.

The cause was referred to a master in chancery. The master reported that there was due upon the note the sum of \$45.75 after allowing credits; that a solicitor's fee, provided for by the mortgage, should be allowed in the sum of \$30, and the master's fees were reported as \$30. The master found in effect that there was no usurious interest contracted for.

The court sustained exceptions by appellees to this report. By the decree the court finds that on January 26, 1898, after the suit had been commenced, the appellees tendered to appellant the sum of \$43 in full satisfaction and discharge of the mortgage indebtedness, and that said amount has been paid to the clerk of the court; and decrees that this sum be accepted by appellant in satisfaction of her mortgage claim, and that the bill of complaint be dismissed at costs of appellant. From that decree this appeal is prosecuted.

CLARK & CLARK, attorneys for appellant.

ROBERT P. BATES and F. J. HOGAN, attorneys for appellees.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The court was perhaps warranted upon the evidence in finding that there was a contract for usurious interest, and therefore in refusing to allow the full claim of appellant under her mortgage. But there is no theory upon which the court could properly deny relief in the allowing of the claim for principal (less credits), and costs and reasonable solicitor's fees. The mortgage provides for an amount of solicitor's fees which we agree with the chancellor in viewing as exorbitant. But this does not preclude the right to a reasonable solicitor's fee, to be fixed by the court. We regard the evidence of appellees as wholly insufficient to establish the contention that the provision for solicitor's fees was inserted in the mortgage after the execution of it, and we are of opinion that the finding of the master in this respect was right. The tender was clearly insufficient, for it did not include solicitor's fees nor costs. The award of the costs in a chancery proceeding is within the discretion of the chancellor; but that discretion must be fairly exercised and may be reviewed. *Linton v. Quimby*, 57 Ill. 271; *North v. Roodhouse*, 52 Ill. App. 17; *Hollingsworth v. Koon*, 117 Ill. 511.

The decree orders a dismissal of the bill of complaint and at the same time awards the sum of \$43 in the hands of the clerk to appellant. The bill should not have been dismissed. The complainant was entitled to some measure of relief, and was in effect awarded relief by the decree which at the same time ordered the bill dismissed.

The decree is reversed and the cause remanded with directions to enter a decree for the amount due to appellant, without the usurious interest, and for the costs, and for such an amount as reasonable solicitor's fees as the court may determine to be equitable. For the latter determination further evidence may be heard if deemed necessary. Reversed and remanded with directions.

**Charles H. Lawrence v. William M. Rhodes.**

1. **REAL ESTATE BROKER—When Entitled to Commissions.**—The broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale and the seller refuses to compel performance, the broker is not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and in binding form, offers to purchase upon the proposed terms.

2. **SAME—What an Agreement to Procure a Purchaser Implies.**—An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract.

3. **SAME—When His Commission is Earned.**—Where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into, which is mutually obligatory upon the vendor and vendee, even though the vendee afterward refuses to execute his part of the contract of sale or purchase.

**Assumpsit**, for commissions. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed February 27, 1900.

MARSTON, AUGUR & TUTTLE, attorneys for appellant.

BULKLEY, GRAY & MOORE, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This was a suit by appellee, a real estate broker, against appellant, to recover commissions earned, as claimed, under the following written contract:

“CHICAGO, May 31st, 1890.

WM. M. RHODES, Esq.:

DEAR SIR: I hereby agree that if you effect sale of the S. W.  $\frac{1}{4}$  Sec. 25, T. 39 N., R. 12 east of 3d P. M., except W. 100 acres (subject to C., B. & Q. right of way,) at \$750 per acre, or better, to pay you  $2\frac{1}{4}$  per cent on \$750 per acre, and one-half of all above that amount, on closing the sale.

CHARLES H. LAWRENCE.”



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From a judgment for \$1,500, recovered in favor of appellee, this appeal is prosecuted. Except as to the conversation between the parties which preceded the making of the agreement, the facts are undisputed.

Evidence of such conversation was offered and admitted, seemingly, for the purpose of showing that before the writing was made, it was understood by the parties that Lawrence should not be liable for commissions unless the buyer that might be procured by Rhodes should actually take the property and pay the price. No objection was interposed to such evidence, and no point is made in the briefs against it. It consisted wholly in the testimony of Lawrence that such was the conversation and understanding between the parties, and of Rhodes in flat contradiction.

The necessary intendment of the verdict is that no such conversation was had, and with the sanction given to the verdict by the trial judge we can not say that the truth is otherwise.

Armed with the contract above set forth, the appellee produced Mr. S. E. Gross as a purchaser of the property, and a written contract (under seal) of purchase and sale of the land was entered into between Lawrence as vendor, and Gross as vendee, dated June 11, 1890.

The material parts of said contract are as follows:

“Said first party (Lawrence) hereby agrees to sell and convey to the second party (Gross) by a good and sufficient warranty deed, with release of dower and homestead rights, subject, however, to the matters hereinafter stated, and said second party hereby agrees to purchase and pay for the premises hereinafter described upon the terms and conditions hereinafter named (describing the premises), and the price to be paid therefor is eight hundred dollars (\$800) per acre; fifteen hundred dollars (\$1,500) whereof is paid upon the signing of this agreement, and receipt of the same hereby acknowledged. Ten thousand and five hundred dollars (\$10,500) more is to be paid upon the delivery of the deed of conveyance, and the balance in three equal annual installments, maturing one (1), two (2), and three (3) years from the date hereof, with interest at six per cent per annum payable semi-annually; said deferred payments to be evi-

denced by notes of the purchaser secured by deed of trust upon said premises, which said trust deed and notes shall be in form satisfactory to first party, the notes being divided into such sums as he shall request, all bearing even date herewith. Said notes shall be payable on or before maturity at maker's option.

Said premises are to be conveyed subject to any easements in the way of streets bordering and traversing the same, and the right of way of the Chicago, Burlington and Quincy Railroad Company, and also subject to taxes for the year 1890, and any special assessments for improvements not already made.

Said party of the first part is to furnish said party of the second part an abstract of title to said premises, or copy thereof, current in Chicago, brought down to date hereof, which shall show a good and valid merchantable title in the party of the first part. \* \* \* In case said second party shall not, upon tender of proper deeds of conveyance to him and of the abstract above described, make the payment of the balance of the cash payment, to wit, ten thousand five hundred dollars (\$10,500), and duly execute, acknowledge and deliver to first party the notes and trust deed for the deferred portions of the purchase price hereof as herein provided, then and in that case this agreement shall be null and void, and the earnest money paid hereon may be retained by the first party as payment in full of all damages for non-performance hereof by said second party. \* \* \*

The terms and provisions of this agreement shall extend to and be binding upon the heirs, legal representatives and assigns of both parties hereto.

In witness whereof, said parties of the first and second part have hereunto set their hands and seals the day and year first above written.

CHARLES H. LAWRENCE. (Seal)  
SAMUEL E. GROSS. (Seal)"

It may here be noted that the following indorsements were subsequently made upon the contract, viz:

"November 14, 1890.

Received of Mr. Charles H. Lawrence the sum of \$1,500 hereinabove mentioned as the deposit made on account of said contract, and release the said Lawrence from all liability under said contract, which is hereby mutually canceled.

S. E. GROSS, (Seal)  
"By MAGRUDER."

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“November 14, 1890.

I hereby release Samuel E. Gross from all liability under the above contract.

CHARLES H. LAWRENCE. (Seal)”

Such indorsements were made without the knowledge or consent of Rhodes. His services and participation in the matter ceased when the contract between Lawrence and Gross was executed, except in the procuring of an abstract of title to the premises, which he finally received from Lawrence on July 29th and delivered to Gross for examination.

The mutual releases of Lawrence and Gross from liability under the contract, and the payment back to Gross by Lawrence of the fifteen hundred dollars paid by Gross on account of the contract price, resulted, not because of any inability of Gross to fully perform the contract, nor because Lawrence did not have “a good and valid merchantable title” to the premises that would pass by his deed, but from mutual agreements arrived at between them at the date of the releases and repayment.

Gross was not called as a witness, and the only evidence as to what occurred between him and Lawrence with reference to the releases and repayment, is the testimony of the latter, which, as reproduced from the abstract to the record, is as follows:

“After that I furnished an abstract to Mr. Gross, and later on I saw Mr. Gross, and he said: ‘I do not want to take this property. It is true that your title may be perfectly good, but here are certain proceedings in court for a foreclosure under the Jewett trust deed. I want this property to cut up and sell in cheap lots.’

Counsel for plaintiff: Was Mr. Rhodes present then?  
A. No, sir. \* \* \*

Mr. Gross said: ‘I want to subdivide this into lots, and with the class of customers I have, I want to have an abstract on which there is nothing that would require any question of any lawyer. The class of lawyers they go to is such that if there was anything they can raise a question on they would make trouble, whether it was good or not, and I am not willing to take the deed.’ And he did not. That is the substance of the conversation. \* \* \*

After the contract with Gross was signed in 1890, nothing further was done except what has been stated, and except the time when he declined to take the property. After that I paid him back the \$1,500 which he had paid as earnest money on the contract, and there was no further negotiations or talk between him and me, or any one in his office, relative to the purchase. I had a conversation with Mr. Rhodes after that in the fall of 1890, and told him how the thing stood—that Mr. Gross would not take the property. He claimed that he was entitled to his commission, and I claimed that he was not. \* \* \*

You are mistaken in understanding that I let Mr. Gross off from the contract signed in June, 1890. That is my signature to the release dated November 14, 1890, appended to the contract offered in evidence. I did not let him off; he had refused to carry it out. I signed that paper, and gave him back the \$1,500 as before stated. I did not consult Mr. Rhodes about it. \* \* \*

What I stated this morning was that Mr. Gross said to me that although my title might be perfectly good, yet, inasmuch as there was a proceeding under the Jewett trust deed, which was the second and junior mortgage, that it did not make so much difference whether it was a valid objection or not, because with the class of customers that he dealt with, and the lawyers—cheap attorneys—to whom they usually went, it might make some trouble in the matter. He did not insist that the title was not good. I considered it perfectly good, and you will see there that the decree of foreclosure under the Jewett trust deed, recognizes the sale and foreclosure of the first mortgage under which I got the title. I never tendered a deed to Mr. Gross.

In regard to the return of the \$1,500, though I can not give the whole of the conversation word for word—as it occurred some eight years ago—the substance was this: That after he had told me he was not willing to complete the contract and take the property and pay for it, he raised some question about this \$1,500, and said to me: ‘Now Mr. Lawrence, you understand my position; and while you can not make me take that property I should probably have to sue you to get back my \$1,500; I do not think, under the circumstances, you ought to keep that.’ The conversation I had with him when I took the first draft of a contract to him, and which was not signed, was referred to, and he said that this matter was spoken of then; that I knew about what he had to have in his business, and that as between man and man in fairness he thought I ought to give that

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back to him. I told him I did not know but there was some equity in his claim; that I did not feel like taking his money if he did not get the property, although I wanted him to carry out the contract; that I did not want any law suit, and did not want the title to the property incumbered by a litigation. I told him I would give the \$1,500 back to him, and I did.

As to what was said about the enforceability of the contract, I do not know whether he used the word 'enforce' or whether he said I could not make him take the land and pay for it. I told him I knew that. I do not think the matter of this second mortgage was talked over between Gross and me at the time the contract was signed. It was when the draft, which was not signed, was taken to him. I think I explained to him how it was, what the circumstances were, and that there was a decree for sale there, but no sale; that the decree recognized the foreclosure under the first mortgage, through which I got title; that my title was perfectly good, and I should like to have it understood with him, that was not to be necessarily an objection. He said he was not a lawyer and did not want to pass on a thing in advance and would wait and see.

Counsel: You got him to release you from your obligations under this contract to convey the land, didn't you, Mr. Lawrence?

A. Why, certainly, when he said he would not take it; I was not going to play fast and loose.

Counsel: Did you get that release in writing?

A. Well, what we finally arrived at was evidenced in writing and is indorsed on that contract."

It was proved at the trial, that subsequent to the mutual releases between Gross and Lawrence, the latter sold the premises to one Wallis for \$50,500, by deed dated January 10, 1891; that Wallis afterward traded the premises back to Lawrence, and that by deed dated May 2, 1893, Lawrence sold and conveyed the same to one Moore for an actual consideration of \$60,000; that said Moore was manager for the said Gross and that he conveyed the premises to Gross by a deed of the same date as the one from Lawrence to himself.

Although this subsequent sale and conveyance of the premises by Lawrence to Moore for the benefit of Gross serves a purpose for some argument, we are not disposed

to place any reliance upon it. It was made after this suit was begun, and does not appear to us to have been the proximate result of the services of Rhodes, but was effected through an entirely different broker.

We are, however, of opinion that Rhodes is entitled, in law, to an affirmance of the judgment, upon the ground that his commission was earned in the first transaction with Gross.

It is said in *Wilson v. Mason*, 158 Ill. 304:

"The true rule is that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and, in binding form, offers to purchase upon the proposed terms. An agreement by a real estate broker to procure a purchaser, not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. So, where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterward refuses to execute his part of the contract of sale or purchase."

It is conceded that Gross was abundantly able to perform his contract with Lawrence, if he had chosen to do so, and it is not questioned that Lawrence was bound by the contract, either to convey the premises or to respond in damages if he failed to convey. All, then, that remains to determine whether Lawrence and Gross, the seller and purchaser, were "bound to each other in a valid contract," is to ascertain if Gross was bound by the contract. It may be that Lawrence had contracted not to enforce specific performance against Gross, but yet if Gross were liable to Lawrence in damages for non-performance, he was bound to Lawrence by a valid contract. It ought not, and, we think, does not affect the question of whether Lawrence and Gross were mutually bound to each other, so far as

Rhodes' rights are concerned, that the obligation is remediable in damages alone, and not through specific performance.

Supposing the contract had been so drawn that each party was liable to the other for damages only, for non-performance, both being expressly relieved from any obligation to specifically perform the contract—would it be contended that Rhodes had not earned his commissions? We think not.

And though the damages were stipulated, would that fact deprive the agent of his commissions, the contract being a valid and binding one? We think not, unless by his participation in the making of the contract he should, by implication, be held to have assented that his commissions should not exceed the stipulated damages recoverable by his principal. *Leete v. Horton*, 43 Conn. 219, is a case where liquidated damages were agreed upon for non-performance of the contract by either party, and the broker who negotiated the contract sued for his commissions, the sale not having been consummated. The court there says:

"Now, though the plaintiff has not effected a sale or an exchange of the defendant's property, yet he has negotiated a contract for such exchange, agreed to by the defendant, in which contract a sum of money is specified which the defendant agrees to accept, and in consideration of which to relieve Clinton from his obligation to make the exchange of properties. Having thus fixed on the sum of five hundred dollars as an equivalent for the performance of this contract to exchange his property, as between himself and his co-contractor, the defendant can not be allowed to deny that that sum of money is an equivalent as between himself and the plaintiff, by whose aid he made the contract. \* \* \*

Clinton failed to perform the contract, electing, in lieu of performance, to pay, or be compelled to pay, the defendant five hundred dollars, agreed and pronounced by the defendant to be equivalent to performance. The plaintiff, then, having rendered services for the defendant, which he agrees are an equivalent to procuring an exchange of his property, is fairly entitled to the same compensation as he would have been entitled to had the exchange been effected."

To much the same effect is *Ward v. Cobb*, 148 Mass. 518;

and the case of *Greene v. Hollingshead*, 40 Ill. App. 195, contains much that is applicable here.

True, Lawrence did not retain the fifteen hundred dollars that he received under the terms of the contract, but, as said, returned the same to Gross rather than suffer litigation or be unfair. But such act can not relieve him from his legal liability to Rhodes, who appears in all fairness to have done everything he had undertaken to do, and for which Lawrence had agreed to pay him. It ought not, and will not, avail Lawrence, that the sale was not closed up, in the sense that Gross took the title and paid the \$10,500, and delivered back his notes and trust deed for the balance. Lawrence and Gross having made a binding, valid contract, through the intervention of Rhodes, if Lawrence chose, for purposes of his own, and without the knowledge or consent of Rhodes, to voluntarily relinquish his rights under it, Rhodes ought not to be deprived of what he had legitimately earned.

The instructions that were given to the jury were most favorable to Lawrence, and we discover no material error in the refusal of others. If there be at first blush an inconsistency in the verdict because for too little, it is not improbable that the jury took the view that because Rhodes knew of the terms of the contract, and did not dissent therefrom, and the contract having been waived by the parties to it, he ought not, in fairness, to have any more than the stipulated damages that Lawrence received, but gave up. Such a view of the case is a very fair one to Lawrence, and we are not prepared to say it is not a truly just one.

The judgment of the Circuit Court will be affirmed.

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**Carrie A. Spencer v. Henry W. T. Mali et al.**

1. **PRINCIPAL AND AGENT—*Liability for the Agent's Debts.***—A single woman, who has no knowledge of business affairs, may employ an agent who is skilled, capable and experienced, to conduct her business, and leave to him its sole management and control, without the risk of having it taken from her by the creditors of her agent.



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Spencer v. Mali.

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**Creditor's Bill.**—Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1899. Reversed and remanded. Opinion filed February 26, 1900.

**Statement by the Court.**—Defendants in error obtained a judgment against George W. Powell and William Powell in the Superior Court of Cook County, on which execution was issued and returned in due course by the sheriff *nulla bona*, and filed their creditor's bill against said George W. Powell, the plaintiff in error, Carrie A. Spencer, and others, for the purpose of subjecting to the lien of said judgment certain property held by said Spencer, as it was claimed, in trust for said Powell.

Powell made no defense, and after answers by said Spencer and the other defendants, and replications thereto, the cause was referred to a master to take proofs and report his conclusions. The master, after taking evidence, reported the same, together with his conclusions, to the court, which the chancellor, after hearing exceptions thereto, approved and confirmed by a decree, the findings of which are identical with the findings of the master.

The decree, after finding the rendition of the judgment aforesaid, return of execution *nulla bona*, and that the judgment was still in force and unsatisfied, in substance finds, among other things, not necessary here to be stated, that George W. Powell had, prior to and during the year 1881, been engaged in business in the State of Indiana in the manufacture and sale of knit garments; that he organized the Amazon Hosiery Co., an Illinois corporation, with a capital stock of \$25,000, and became its president and a director; that he subscribed for \$10,500 of the stock of this corporation, and paid for the same from the assets of his previous business; that he received an annual salary from the corporation of \$3,800, and was its active manager and controller; that up to 1885 the plaintiff in error had never owned any property and had never engaged in any business; that Charles A. Spencer, the husband of plaintiff in error and brother-in-law of said Powell, in 1886, established in

Chicago a business similar to the business of the Hosiery Co., known as the Princess Knitting Works, with a capital of about \$3,000; that in July, 1887, plaintiff in error was divorced from her husband, who transferred to her, at that time, the business of said Knitting Works, which was substantially insolvent, and also paid to her the sum of \$4,000 in cash; that in July, 1887, plaintiff in error executed to said Powell a power of attorney which authorized him to act for her in every way in carrying on the business of said Knitting Works and otherwise; that she had nothing whatever to do with the business, and never received anything but verbal reports from Powell as to its condition; that the Knitting Works was carried on under the name of C. A. Spencer & Co. until in January, 1895, when its net assets were \$176,000; that in the fall of 1896 the Hosiery Co. moved its plant to Muskegon, Michigan, and the Knitting Works and Hosiery Co. were consolidated by the transfer of the former to the latter, and said Spencer received in payment for such transfer stock in the Hosiery Co. the amount of about \$115,000; that after the year 1887, Powell received an annual salary of \$1,200 for his services to the Knitting Works; that out of the profits arising from the business of the Knitting Works said Spencer, acting through Powell, purchased certain real estate in Edgewater, Cook county, at a cost of about \$20,000, erected a residence thereon, which she and said Powell and his family have ever since continued to occupy; that this property is mortgaged for \$10,000; that in 1893, said Spencer purchased other real estate, described in the decree, from the profits of the business of the Knitting Works, and erected a factory building thereon, the whole costing about \$30,000, and which is mortgaged for the sum of \$20,000; all the business being done with regard to said purchases and the erection of said building under the supervision and direction of Powell; that certain stock in the Hosiery Co. owned by Powell and deposited as collateral security with various of his creditors, was purchased in the name of Spencer by Powell with the profits of the business of the Knitting Works, but she never at any time

saw any of such stock; that the business of the Knitting Works and the Hosiery Co. was done by Powell acting on his own independent judgment; that he paid to plaintiff in error from the time he assumed the management of the Knitting Works \$50 per month for expenses, and also various of her bills; that he lived rent free in said residence and paid all expenses for repairs and taxes thereon, but made no report thereof to plaintiff in error; that he is skilled and experienced in the business conducted by said Knitting Works, and that the profits derived therefrom are due solely to his management; also that Powell received as an annual salary, \$1,200, from the Protection Mutual Fire Insurance Co.

Based upon the foregoing findings, the master concluded that the profits of said business in equity and good conscience were the property of Powell, and the chancellor agreed with the master and decreed that the said real estate with its improvements was subject to the lien of said judgment, and ordered the same to be sold by the receiver, who had been theretofore appointed, and the net proceeds of said sale applied toward the payment of the judgment; also that plaintiff in error convey said stock in the Hosiery Co. to the receiver, and that Powell and plaintiff in error deliver possession of said real estate to the receiver within fifteen days from the entry of the decree. To reverse said decree this writ of error is prosecuted by Carrie A. Spencer.

The findings of fact in the decree as above set forth are substantially sustained by the evidence, and it also appears that the \$4,000 in cash paid to Mrs. Spencer by her husband was used by her, through Powell, in the conduct and prosecution of the business of the Knitting Works, but it does not appear that any money of Powell ever went into that business; also, that Powell gave very little of his time to the business of the Knitting Works, for the first four or five years not to exceed an hour a day, except the time spent in selling the product of the factory, which was usually done to a few customers, and in the year 1896 did not require of Powell to exceed ten days. There is no evidence

tending to show that Mrs. Spencer had any knowledge that Powell was indebted to defendants in error or to any other persons. The stock of the Hosiery Co. was increased from \$25,000 to \$225,000, of which Powell holds only about \$500; the remainder, not owned by Mrs. Spencer, is owned by other persons.

REMY & MANN and DAVID J. WILE, attorneys for plaintiff in error.

NEWMAN, NORTHRUP & LEVINSON, attorneys for defendants in error.

MR. JUSTICE WINDES delivered the opinion of the court.

The principal and controlling question presented by this record is whether a single woman, who has no knowledge of business affairs, may employ an agent who is skilled, capable and experienced, to conduct her business, and leave to him its sole management and control, without the risk, in case it yields large profits, of having it taken from her by the creditors of her agent.

We are of opinion that no rule of law or equity requires that any one should be subjected to any such risk, in the absence of a showing of fraud on his part.

As we have seen, the business turned over to Mrs. Spencer by her husband was small, and, as the decree finds, was substantially an insolvent one, though its assets amounted to at least \$3,000 if not \$3,700. To this business she added the \$4,000 in cash which she received from her husband, and there is no evidence whatever that any money of Powell ever went into the business. It was very profitable under the conduct and management of Powell, though he gave very little of his time to it. He was paid a salary, so far as appears from this record, which was entirely reasonable considering the time he gave to the business. He received salaries from the other two corporations by which he was employed amounting to \$5,000 per year.

The fact that he failed to make any other than verbal

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reports to Mrs. Spencer as to the conduct of the business, does not of itself prove fraud, and in our opinion is entirely consistent with honesty of purpose on his part as well as hers, when the circumstances are considered. She knew nothing of business and knew that Powell was experienced in that line of business, and her capital being small, she might well have trusted to Powell, who was her sister's husband, he furnishing her, as he did, from time to time, from the profits of the business, with money to pay her current expenses and bills, and besides, the money to buy her a residence and subsequently a factory for the conduct of the business. Under such circumstances most any woman not familiar with business or business methods, would most naturally give her agent free rein and full power to do as to him seemed best, and would not be disposed to trouble him with critical or detailed inquiries or written reports with regard to her affairs, which, from visible results by way of money that came when wanted for her own personal needs and was ready to meet the demands of her business as required, appeared all the while to be prospering.

After the most careful reading of the evidence, both in the original and additional abstracts, guided by the able arguments of counsel, we are unable to perceive, in the light of such evidence and the findings of fact by the master and the chancellor, upon what basis they reach the conclusion that in equity and good conscience the property which was the result of the profits arising from the business of Mrs. Spencer, carried on by Powell, should be held to be the property of Powell and subjected to the payment of his debts.

It is argued by defendants in error, in support of the decree, that inasmuch as Mrs. Spencer placed her property and money in the hands of Powell and allowed him to carry on her business, the original capital will in equity be considered as a loan to him, and that its increase, caused by the labor and skill of Powell, should be subjected to the payment of his debts. In support of this contention they cite and especially rely upon the cases of Wortman v. Price,

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47 Ill. 22; Wilson v. Loomis, 55 Ill. 352; Robinson v. Brems, 90 Ill. 351; Lachman v. Martin, 139 Ill. 450; and Pease v. Barkowsky, 67 Ill. App. 276.

These cases are all cases of husband and wife, and the decisions are made with express reference to the statute in that regard, and its effect on the common law, which, prior to the statute, gave the husband, upon marriage, title to the personal estate of the wife which came to his possession. After a careful consideration of these cases, we think their doctrine should not be applied to the case at bar, as the relation of husband and wife does not here exist. If the doctrine of these cases should be extended to persons not occupying the marital relation toward each other, there could never be any safety in any one employing an agent to carry on a mercantile or manufacturing business and leave to such agent the full and untrammelled control and management thereof.

In the Lachman case, *supra*, it was held that a wife may avail herself of the services and agency of her husband in the conduct of her business, without subjecting the profits arising from his management to the claims of his creditors, but that an insolvent debtor can not use his wife's name as a mere device to cover up and keep from his creditors the assets and profits of a business which is in fact his own, and the court says:

"It must clearly appear that the wife is the *bona fide* owner of the capital invested in the business, and that the accumulations which result from the conduct of the business are the legitimate outcome of the investment of her property."

In the case of Murphy v. Nilles, 166 Ill. 107, which is also a case of husband and wife, the above language from the Lachman case is quoted with approval by the court, but it was held in the case there considered that the husband used the wife's moneys in "shrewd speculations on his own account," and for that reason they were subject to the payment of his debts.

In this case the proof is clear that Mrs. Spencer was the *bona fide* owner of the capital invested in the Princess

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Knitting Works, which was her own business, conducted in her own name, on her own account, and that the profits arising from the conduct of that business were the legitimate outcome of the investment of her property and money, through the services of her agent, who was paid an adequate compensation by her for his work. The fact that the business was remarkably successful should not militate against her, especially so when it fails to appear that she knew anything in regard to Powell's indebtedness, or that either she or Powell resorted to any concealment or subterfuge calculated to deceive or mislead any one.

The case *Tripp v. Childs*, 14 Barb. 85, is also specially relied upon by counsel for defendants in error. It appears in that case that the very purpose of the contract under consideration, being that of a father, a physician, with his son, to do a medical practice for and in the name of the latter, was to protect the father from the claims of his creditors, of which the son was well aware, and there was no pretense that the father, who professed to be acting as agent for the son, ever paid over any proceeds of the business, and, moreover, the court say of the business done by the father for his son, "The service was foreign to the son's business; he had no need or occasion to do business in that capacity."

We do not regard the case as at all applicable here. Mrs. Spencer came into a business of which she knew nothing, and was in immediate need of some competent and experienced person to conduct it for her, and had a perfect right to, and it was the most natural thing imaginable that she would seek the services of such a person as Powell to conduct her business.

It is also claimed that the findings of the master, having been concurred in by the chancellor, will not be disturbed unless they are manifestly against the weight of the evidence. We think the rule invoked, even if it may be said to go to the extent claimed, is not applicable here. This is not a case of conflicting evidence, but rather of conclusions to be deducted from the evidence, which is not conflicting.

It is elementary that when fraud is charged as a basis for relief, it must be proved. From the evidence in this record and the facts found by the master and the chancellor, we do not think that there can be deduced that clear inference of fraud which is necessary to justify the decree rendered.

It is also claimed that the record is not complete, and therefore that this court, by reason thereof, will not consider the merits. The transcript of the record is certified to be according to *præcipe* filed. The *præcipe* shows that the clerk was directed to include in the transcript all items of the record (specifying the same) necessary to make a complete record. We regard it as sufficient to justify us in passing upon the merits of the case.

The decree of the Circuit Court is reversed, but inasmuch as the bill prays for an accounting between Powell and Mrs. Spencer to ascertain what, if anything, was due to the former from the latter, the cause is remanded for the purpose of taking such accounting, if the defendants in error should so be advised. This disposition of the case makes it unnecessary to consider other points made by defendants in error. Reversed and remanded.



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